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No.

IN THE

Supreme Court of the United States

October Term 1984

CHARLES G. REMINICK, HERBERT M. BRITTON, BERNARD SPEAR, and PETER BLITZER, individually and doing business as REMINICK, AARONS & COMPANY,

Petitioners,

—against—

JACK MALTZ, ALFRED WACHTEL, JULES ARRONSON, MELVIN KRAUSS and JOSEPH BINENBAUM,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTION PRESENTED FOR REVIEW

Whether ERISA preempts and prohibits a third-party claim in a state court action for contribution and indemnity against trustees of any employee benefit plan for their breaches of duty?

PARTIES

Plaintiffs are Retail Shoe Health Commission, and Jack Maltz, Alfred Wachtel, Jules Arronson and Melvin Krauss, as Trustees of Retail Shoe Health Commission.

Defendants and Third-Party Plaintiffs are Charles G. Reminick, Herbert M. Britton, Bernard Spear, and Peter Blitzer, individually and doing business as Reminick, Aarons & Company.

Third-Party Defendants are Jack Maltz, Alfred Wachtel, Jules Arronson, Melvin Krauss and Joseph Binenbaum, and Tolley International Corporation, and The Estate of Harold Jacobson and Basil Castovinci Associates, Inc.

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No.

CHARLES G. REMINICK, HERBERT M. BRITTON, BERNARD SPEAR, and PETER BLITZER, individually and doing business as REMINICK, AARONS & COMPANY,

Petitioners,

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JACK MALTZ, ALFRED WACHTEL, JULES AARONSON, MELVIN KRAUSS and JOSEPH BINENBAUM,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The Petitioners Charles G. Reminick, Herbert M. Britton, Bernard Spear and Peter Blitzer, individually and doing business as Reminick Aarons & Company (hereinafter referred to as "Reminick, Aarons") respectfully pray that a writ of certiorari issue to review the decision and order of the Court of Appeals of the State of New York which held that the Employee Retirement Security Act of 1974 ("ERISA") preempted the jurisdiction of the state courts to adjudicate claims for contribution and indemnity.

OPINIONS BELOW

The opinions of the New York Supreme Court, County of New York, Appellate Division, First Department, and the Court of

Appeals are as yet unreported. Copies of these opinions are appended hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES

ERISA § 502(e), 29 U.S.C. § 1132(e), provides in part:

> "(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section."

ERISA § 502(a), 29 U.S.C. § 1132(a), provides in part:

> "Persons empowered to bring a civil action.
>
> (a) A civil action may be brought —
>
> (1) by a participant or beneficiary-
>
> (A) for the relief provided in subsection (c) of this section or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the plan;
>
> (2) by the Secretary or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary or by a participant or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title . . . "

ERISA § 514(a), 29 U.S.C. § 1144(a), provides in part:

"(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

New York's Civil Practice Law and Rules ("CPLR") Article 14 provides in part:

"§ 1401. Claim for Contribution

Except as provided in Section 15-108 of the general obligations law, two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered when contribution is sought.

§ 1402. Amount of Contribution

The amount of contribution to which a person is entitled shall be the excess paid by him over and above his equitable share of the judgment recovered by the injured party; but no person shall be required to contribute an amount greater than his equitable share. The equitable share shall be determined in accordance with the relative liability of each person liable for contribution.

§ 1403. How Contribution Claimed

A cause of action for contribution may be asserted in a separate action or by cross-claim, counterclaim or third-party claim in a pending action."

New York's CPLR Article 14-A provides:

§ 1411. Damages recoverable when contributory negligence or assumption of risk is established

In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.

§ 1412. Burden of pleadings; burden of proof

Culpable conduct claimed in diminution of damages, in accordance with section fourteen hundred eleven, shall be an affirmative defense to be pleaded and proved by the party asserting the defense.

§ 1413. Applicability

This article shall apply to all causes of action accruing on or about after September first, nineteen hundred seventy-five.

STATEMENT OF THE CASE

This is an action arising out of an alleged embezzlement of approximately $675,000 from the Plaintiff Retail Shoe Health Commission ("Retail Shoe") by its former administrator, Jerome Simon. Retail Shoe's Complaint alleged that it was a collectively bargained, multi-employer, jointly administered welfare fund (the "Fund") organized under the Labor and Managements Relations Act of 1947. The co-Plaintiffs Jack Maltz, Alfred Wachtel, Jules Arronson and Melvin Krauss sued as Trustees of the Fund.

The Petitioners Charles G. Reminick, Herbert M. Britton Bernard Spear and Peter Blitzer doing business as Reminick, Aarons is a firm of certified public accountants which were employed by the Fund. The main Complaint alleged that during the period 1972 to 1980 Reminick, Aarons was negligent by failing to discover the dishonest acts of Simon. Simon was alleged to have defalcated monies from the Fund by making bogus claims.

Petitioner Reminick answered the Complaint denying the allegations thereof and asserted several affirmative defenses including the following:

> "If any damages have been sustained by the Plaintiffs, which damages are expressly denied, then all such damages will have been caused and/or brought about in whole or material part, by the affirmative wrongdoing, fault, breach of fiduciary obligation, poor business judgment, negligence, failure of due care, and other wrongdoing of the Plaintiffs without similar acts of the Defendants contributing thereto, and, as a consequence of the foregoing the Complaint should be dismissed in all respects and/or any proven damages be proportionately reduced to the extent of Plaintiffs' contributing fault."

The Trustees of the Fund had a duty as fiduciaries to monitor the Fund and the activities of its Administrator Simon. Similarly, other professionals, including the Fund's actuaries Tolley International Corp. ("Tolley") and Basil Castovinci Associates, Inc. ("Castovinci") were hired to monitor the Fund and its Administrator. The actuaries were retained by Retail Shoe to administer the claims for benefits submitted by the Fund's beneficiaries and to insure that the proper benefits were paid.

Petitioner Reminick Aarons instituted, pursuant to CPLR Article 14, a Third-Party Complaint seeking contribution from the Trustees, a former Trustee, Joseph Binenbaum, and actuaries Tolley and Castrovinci. The Third-Party Complaint alleged that the losses and damages of Retail Shoe were caused and brought about in whole or material part, by the Trustees' acts of omission and/or commission in permitting and continuing, participating in and/or acquiescing to any proven embezzlements by the Fund's Administrator Simon.The Third-Party Complaint alleged that the Trustees, Tolley and Castovinci had all or part of the responsibility for uncovering and/or reporting the illegal acts. And for that reason Petitioner Reminick Aarons demanded judgment over and against them both by way of contribution and/or indemnity to the extent of each party's proportionate and participating fault and culpability.

The Trustees moved to dismiss the Third-Party Complaint on the basis that the state Court lacked jurisdiction to adjudicate the Petitioner's claims for contribution because those claims were preempted by § 514(a) of ERISA, 29 U.S.C. § 1144(a) and that the State Court lacked jurisdiction under § 502(e) of ERISA, 29 U.S.C. § 1132(e).

The Supreme Court of the State of New York denied the Trustees' Motion to dismiss the Third-Party Complaint holding that the statutory right of contribution and/or indemnity was "a vital state interest" and was only "tangential" to the regulatory objectives of ERISA. The court reasoned that the Petitioners' claims for contribution and/or indemnity were not subject to federal preemption under ERISA and that the New York Supreme Court did have subject matter jurisdiction to adjudicate the CPLR Article 14 contribution and indemnity claims.

The New York Appellate Division, First Department, affirmed the Supreme Court in all respects, but granted leave to Appeal to the New York Court of Appeals.

The New York Court of Appeals in an erroneous four to three split decision reversed. The Court of Appeals held that the Petitioners' claims for contribution were preempted by ERISA and that the state courts lacked jurisdiction over the subject matter of the contribution claims.

The Court of Appeals decision stated in part:

> "The preemptive provisions of ERISA govern the judicial determination of breach of fiduciary duty claims against the trustees of an employee welfare benefit plan within the embrace of that Act and preclude actions in state court for enforcement of such claims. Accordingly, where such a plan has brought an action in our State courts against its accountants and consultants for their alleged failure to detect and report substantial misappropriations by the administrator of the plan, our courts are foreclosed from entertaining claims over by the accountants and consultants against the individual trustees of the plan for contribution or indemnity based on allegations that breach of their fiduciary duties by the trustees contributed to the losses sustained by the plan."

* * *

As a matter of substantive law, the nature and scope of the duties and liabilities of the trustees in this regard are determinable under the provisions of ERISA (e.g. ERISA ¶ 404, 405, 409; 29 U.S.C. ¶ 1104, 1105, 1109)

The question then arises as to whether those claims may be asserted in a state court action such as the present. Here again, it is the provisions of ERISA which are determinative. Subdivision (e) of section 502 of ERISA (29 U.S.C. ¶ 1132[e]) provided that the district courts of the United States shall have exclusive jurisdiction over civil actions arising under ERISA (with an exception not now pertinent). Accordingly, we are obliged to conclude that the present claims asserted by Reminick and Tolley against the trustees may not be entertained in our State courts.

* * *

If there is a deficiency or inequity in the scope of section 502(a), it is attributable to the Act itself and any petition for remedy or correction must be addressed to the Congress."

The dissenting opinion of Judge Judith Kaye joined in by Chief Judge Cooke and Judge Wachtler pointed out.

"... the result reached by the Court allows the trustees to escape responsibility for losses due in whole or part to their own derelictions, and leaves respondents with a potential massive liability and no effective remedy against plaintiffs who are also wrongdoers. I do not believe that ERISA requires this unpalatable result, and therefore would affirm the order below.

* * *

A pivotal assumption underlying the majority's holding is that respondents' (Petitioner's) claims are barred because they are not within the classes of persons authorized to bring a civil action under ERISA. But a claim for relief is not necessarily preempted or extinguished because the initiating party falls outside the enumerated categories of

¶ 1132(a). (See *Franchise Tax Bd* v. *Construction Laborers Vacation Trust,* U.S. , 103 S Ct 2841.)

> Nor is the provision for exclusive federal jurisdiction a bar to entertaining respondent's claims. First, that provision applies, by its own terms, only to actions brought by the enumerated persons which do not include respondents. Second, it is well established that even where statutes preempt state law and provide for exclusive federal jurisdiction state courts may, applying federal law, decide issues necessary to the resolution of the action (*Hathorn* v. Lovorn, 457 U.S. 255, 266 & n.18; *Pan Am. Co.* v. *Superior Court*, 366 U.S. 656, 664-65). Though the exclusive jurisdiction provisions of ERISA might prohibit the commencement of a state court action seeking affirmative relief against the trustees for their derelictions as trustees, it still would not prevent the state court from considering such questions when they are part and parcel of defenses to a cause of action premised on state law. (See, e.g. *Weiner* v. *Shearson*, 521 F.2d 817; *Shareholder Mgmt Co.* v. *Gregory*, 449 F.2d 326; *Birenbaum* v. *Bache & Co.*, 555 S.W.2d 513 [Tex. App.]). The same rationale should apply here. Sustaining respondents' claims against the trustees would not alter substantive rights created by ERISA or disturb any allocation of responsibility among employers subject to ERISA (*Michota* v. *Anheuser - Busch, Inc.* Nos. 76-193, 77-2543 [D.N.J. decided October 7, 1983, unpublished opinion]) but would simply allow respondents to maintain apportionment claims in one action, as is common in tort cases in the state courts."

It is respectfully urged that the New York Court of Appeals erred in its interpretation of ERISA and that the Court's holding is contrary to and does violence to the letter, purpose and intent of ERISA. The purpose of ERISA is to hold trustees responsible for derelictions of their duties. And the Court of Appeals decision does great violence to that purpose by allowing "the trustees to escape responsibility for losses due in whole or in part to their own derelictions."

REASONS RELIED ON FOR ISSUANCE OF THE WRIT

1. THE DECISION OF THE NEW YORK COURT OF APPEALS INTERPRETING ERISA DEFEATS THE PURPOSE AND INTENT OF ERISA AND DOES VIOLENCE TO THE COMPREHENSIVE PROGRAM TO PROTECT EMPLOYEE BENEFITS FROM IMPROPER ACTS OF EMPLOYERS AND/OR TRUSTEES.

ERISA's preemption provision ¶ 514(a), 29 U.S.C. 1144(a), is based on the Supremacy Clause of the Federal Constitution. U.S. Const. Art. VI, c. 2; *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat) 315, 327 (1819); *DeCanas* v. *Bica*, 424 U.S. 351, 357-58 n.5 (1976); *Free* v. *Bland*, 369 U.S. 663, 666 (1962). The purpose of the Supremacy Clause is to insure that Federal laws will have national application and force in any conflict with state laws. *Mayo* v. *United States*, 319 U.S. 441, 445 (1943).

In determining whether a federal statute preempts a state law:

> "It will not be presumed that a federal statue was intended to supercede the exercise of the power of the State unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly presumed."

New York State Dept. of Soc. Serv. v. *Dublino*, 413 U.S. 405, 413 (1973) (quoting from *Schwartz* v. *Texas*, 344 U.S. 199, 202-403 (1952))

> "... [I]nflexible application of the (preemption) doctrine is to be avoided especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the Federal regulatory scheme."[1]

[1] State laws which do not clash with ERISA have been widely held not to be preempted by ERISA. Thus, state community property and support decrees affecting the distribution of pension benefits and exercise of fiduciary duties have been upheld against claims of federal preemption by ERISA. *Carpenters Pension Trust Fund N. Cal.* v. *Campa*, 444 U.S. 1028 (1980), (*dismissing appeal from*, 89 Cal. App. 3d 113, (Ct. Appl. Cal. 1st App. Dist.) *AT&T* v. *Merry*, 592 F.2d 118 (2d Cir. 1979); *Cody* v. *Riecker*, 454 F. Supp. 22 (E.D.N.Y. 1978), *aff'd* 594 F.2d 314 (2d Cir. 1979); *Stone* v. *Stone*, 450 F. Supp. 919 (N.D. Cal.

Farmer v. *United Brotherhood of Carpenters*, 430 U.S. 290,302 (1977) (union official's claim for intentional infliction of emotional distress against union not preempted by National Labor Relations Act); *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473 (1981) (federal courts do not have exclusive jurisdiction over personal injury and indemnity cases under the Outer Continental Shelf Lands Act ("OCSLA")). In *Gulf Offshore Co.* the Supreme Court summarized the principles governing state court jurisdiction to decide federal issues. In every case there is a presumption that state courts enjoy concurrent jurisdiction over those claims *Id.*, at 478. Only an explicit statutory directive, an unmistakable implication from legislative history or a clear

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1978), *aff'd* 632 F.2d 740 (9th Cir. 1980), *cert den.*, 453 U.S. 922 (1981); *Operating Engineers* v. *Zambersky*, 650 F.2d 196 (2d Cir. 1981) *Pardee* v. *Operating Engineers Pension Trust*, 408 F. Supp. 666 (C.D. Cal. 1976); *Clark* v. *Geraci*, 93 Misc. 2d 206, 402 N.Y.S.2d 929 (Sup. Ct. 1978). Similarly ERISA has been held not to preempt fair employment laws prohibiting discrimination in employment by requiring that pregnancy benefits be paid by employee welfare benefits plans. *Delta Airline* v. *Kramarsky*, 650 F.2d 1287 (2d Cir. 1981) *Gast* v. *Oregon*, 36 Ore. App. 441, 585 P.2d 12 (Ore. Ct. App. (1978); *Time Ins. Co.* v. *Dept. of Industry*, Labor Empl. Prac. Cas. (BNA) 391 (Wis. Cir. Ct. 1978). Likewise, ERISA does not exempt a debtor's pension benefits from New York's CPLR provisions governing enforcement of money judgments. *NBNA* v. *Electrical Workers Local* Union 3 Pension and Vacation Funds, 69 App. Div. 2d 679, 419 N.Y.S.2d 127 (2d Dept 1979), *app. dis.*, 48 N.Y.2d 752. *AT&T* v. *Merry*, 592 F.2d 118 (2d 1979). *See also, Hotel & Restaurant Employees & Bartenders Int. Union Local 54* v. *Danzinger*, 536 F. Supp. 317 (D.N.J. 1982) (New Jersey's Casino Control Act not preempted by ERISA). *Employee Savings Plan of Mobil Oil Corp.* v. *Geen*, 535 F.Supp 105 (S.D.N.Y. 1982); *Providence* v. *Valley Clerks Trust Fund*, 509 F. Supp. 388, 391 (E.D. Cal. 1981); *Cornell Manuf. Co.* v. *Mushlin* 70 App. Div. 2d 123, 420 N.Y.S.2d 231 (2d Dept. 1979) (action for waste of corporate assets by excessive payments into a pension plan not preempted by ERISA. As the Court in *Providence* v. *Valley Clerks Trust Fund, supra*, found:

> "(I)t now seems settled that where the state law has only an indirect effect on the plan and where it is one of general application which pertains to an area of important state concern, the court should find there has been no preemption."

Minn. Mining & Manuf. v. *Minnesota*, 444 U.S. 1041 (1980), *dismissing app. from*, 289 N.W. 2d 296 (Sup Ct. Minn. 1979) (State antidiscrimination law not preempted).

incompatibility between state court jurisdiction and federal interests will rebut the presumption. Even a finding of exclusive federal jurisdiction will not prevent a state court from deciding a federal question collaterally. *Id.*, at 483 n. 12; *Hathorn* v. *Lovorn*, 457 U.S. 255, 102 S. Ct. 2421, 2428-29 & n. 18 (1982).

As Justice Frankfurter stated in *Pan Am Petroleum Corp.* v. *Superior Court*, 366 U.S. 656, 664 (1961):

> "Exclusive jurisdiction is given the federal courts but it is exclusive only for suits that may be brought in federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded."

W. Kilberg and C. Heron, "*The Preemption of State Law Under ERISA*, Duke Law J. 383, 391 (April, 1979) stated:

> ". . . (There is) no doubt that Congress intended to preserve some applications of state law in areas that are traditionally subjects of State action - insurance, banking, securities, workmen's compensation, disability and unemployment programs. It fell to the courts to apply this mixed intent to the enormous variety of employee benefits plans and the myriad of state laws that relate to them in a host of different ways. In carrying out their responsibility the courts must apply congressional intent with due regard for the sometimes exclusive standards of federal supremacy."

In *Franchise Tax Board* v. *Const. Laborers Vac. Trust*, ____ U.S. ____, 103 S. Ct. 2841, 2854-55 (1983) the Supreme Court held that ERISA 502(a) (the civil enforcement provision) "does not purport to reach every question relating to plans covered by ERISA." The Supreme Court further held that ERISA 514 (the preemption provision) "makes clear that Congress did not intend to preempt every state cause of action relating to such plans." Thus, ERISA 514 explicitly excepts from preemption state laws which regulate insurance, banking or securities and criminal laws of general application. Furthermore, ERISA explicitly permits state courts to decide actions relating to breaches of fiduciary

duties under ERISA brought by a plan beneficiary under ERISA 502(a)(1)(B),(e).

ERISA also implicitly makes clear that third-parties can raise claims relating to breaches of fiduciary duties in state courts.

ERISA § 412, 29 U.S.C. § 1112 requires that all fiduciaries be bonded, i.e. there must be breach of fiduciary duty liability or fidelity insurance in place. ERISA § 410, 29 U.S.C. § 1110 provides that a plan may purchase insurance for its fiduciaries or itself to cover liability occurring by reason of an act or omission of a fiduciary, if, and only if, the insurance is with recourse by the insurer against the fiduciary in the case of a breach of fiduciary duties. These suits would be brought in state court as no federal jurisdiction was conferred by ERISA over suits by subrogated insurers. The reason why ERISA requires that insurance bought by plans must be with recourse is that Congress did not want plans and their beneficiaries to pay higher premiums for insurance without recourse. In other words, Congress did not want the expense of fiduciary defalcations to fall upon plans and their beneficiaries. As Senator Javits explained:

> "The conferees decided to include a provision permitting either the employer, the union, the plan or the trustee himself to purchase insurance covering the personal liability of a trustee in the event of a trustee's breach of fiduciary responsibility. However, the conferees qualified the purchase of such insurance by the plan by requiring that the insurance policy permit recourse against the trustee by the carrier in the event of a claim involving a breach by the trustee. The purpose of this qualification is to spare the plan-and its participants and beneficiaries-the expense of exorbitant premiums in the absence of recourse provisions. There is no justification whatsoever for plan participants and beneficiaries having to shoulder the burden of subsidizing breaches of fiduciary responsibility committed by their trustees.
>
> Some concern has been expressed that this provision might inhibit employer or union representatives from serving as trustees. However, similar provisions have existed under the bonding requirements of the Welfare and Pension

> Plans Disclosure Act since 1962 without any adverse effect. In any event, it is highly doubtful that a person unwilling to accept full fiduciary responsibility should serve in positions of trust and, quite obviously, nonrecourse policies of insurance can be purchased by the employer or union involved without shifting the economic burden to the participants and beneficiaries."

HR2, 93rd Cong. 2d Sess., 120Cong. Rec. 22, 1974. Senator Javits was a leading proponent of pension legislation over many years, a co-sponsor of ERISA and the ranking minority member of the Senate Committee on Labor and Public Welfare. As such his statements are most influential in determining congressional intent. *City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624, 637 (1973); HR2, 93rd Cong. 2d Sess. 120 Cong. Rec. 29,1934 (1974).

That an insurer, under ERISA can sue a fiduciary for breaches of fiduciary duties is unmistakable proof that suits alleging breaches of fiduciary duty by persons other that those listed in the civil enforcement statute, ERISA § 502(a), 29 U.S.C. 1132(a), are not preempted by ERISA § 514(a), 29 U.S.C. 1114(a) and that state courts retain jurisdiction over such suits. Indeed the instant action is an example of an action by a subrogated insurer.

Furthermore, a claim of contribution, such as the Petitioners raise here, is founded on the theory of subrogation. *Rouley* v. *State Farm Mutual Auto Ins. Co.*, 235 F.Supp 786 (D. La. 1964). Subrogation is the same theory behind insurance with recourse which Congress provided for in § ERISA 410, 29 U.S.C. 1110. A claim for contribution is a derivative right and not a new cause of action. *Rowe* v. *John C. Mottler Printing Press Co.*, 273 F.Supp. 363 (D.R.I. 1967). No independent subject matter jurisdiction is required for a contribution claim. A contribution claim may be premised on ancillary jurisdiction.

The purpose of ERISA is to protect the "continued well-being and security of millions of employees and their dependents" 29 U.S.C. § 1001(a).

ERISA § 2(b), 29 U.S.C.1002(b) provides:

> "It is hereby declared to be the policy of this Act to protect interstate commerce and the interest of participants in employee benefit plans and their beneficiaries by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans and by *providing appropriate remedies*, sanctions and ready access to the Federal Courts. (emphasis supplied).

The purpose behind New York's contribution statute is the advancement of a strong public policy to hold a co-tortfeasor responsible for his proportionate share of Plaintiff's injuries. *Ackerman* v. *Southern Wood Piedmont Co.*, 409 F.Supp. 469, 472 (E.D.N.Y. 1976); *Raymond* v. *Ormsby*, 54 App. Div.2d 1021, 388 N.Y.S. 2d 365 (3d Dept. 1976). Another purpose of the contribution statute is judicial economy and the avoidance of inconsistent verdicts. *Meckley* v. *Hertz Corp.*, 88 Misc.2d 605, 608-609, 388 N.Y.S.2d 555, 557 (Sup. Ct. N.Y. Co. 1976); *Zillman* v. *Meadowbrook Hospital Co.*, 73 Misc.2d 726, 729, 358 N.Y.S.2d 466 (2d Dept. 1974), *rev'd* on *other grounds* 45 App. Div.2d 267 (2nd Dept. 1974); *Stein* v. *Whitehead*, 40 App. Div.2d 89, 337 N.Y.S.2d 821 (2d Dept. 1972); McKinney's CPLR § 3019 *Prac. Com.* § 3019:37 at 238-39.

The philosophy behind allowance of contribution between tortfeasors is that the discharge of an obligation by one of the obligors without proportionate payment from the other gives the latter an advantage to which he is not equitably entitled. *George's Radio, Inc.* v. *Capital Transit Co.*, 126 F.2d 219 (D.C. Cir. 1942); *Cokas* v. *Perkins*, 252 F. Supp. 563 (D.D.C. 1966); *see, also, Cooper Stevedoring Co, Inc.* v. *Kopke*, 417 U.S. 106, 115 (1974) (contribution rests on a finding of concurrent fault).

The traditional American rule that there was no right of contribution among joint tortfeasors was based on a misreading of the English case of *Merryweather* v. *Nixan*. *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77 n. 10, 16, 17 (1981). Most states have abrogated this rule and (t)he federal courts have come to realize that the policy considerations upon which

the traditional rule was built are archaic and lead to inequities." *Id.*

It is now generally recognized that:

> " . . . (I)t is inequitable to require one to pay the entire cost of reparation, and it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability."

Northwest Airlines Inc., Id. at 88 & n.19.

Permitting contribution among joint tortfeasers is not only consistent with, but furthers an important purpose of federal statutes such as ERISA, i.e., deterrence from wrongful conduct. *Stratton Group* v. *Sprayregen*, 466 F. Supp. 1180 (S.D.N.Y. 1979); *see, also, Sirota* v. *Solitron Devices*, 673 F.2d 566 (2d Cir. 1982), *cert. den.*, _____ U.S. _____, 103 S. Ct. 86 (1983) (accountants entitled to contribution from officers, directors and company where officers, directors and company all participated in defrauding purchasers of the company's stock.)

The New York Court of Appeals, however, interpreted ERISA to allow the trustees to "escape responsibility" for "their own dereliction." The New York Court of Appeals has provided wrongdoing trustees and fiduciaries with a way to avoid the strictures of ERISA by suing in state court where the trustees violations of their fiduciary duties cannot be questioned. Thus, the decision of the New York Court of Appeals is contrary to the purpose and intent of ERISA and must not be permitted to stand.

In this regard, the legislative history of ERISA discloses that one of the chief procedural weaknesses with the Welfare and Pension Disclosure Act of 1958 was that it relied upon the initiative of the individual employee to police the management of his plan. H. Rep. No. 533 93rd Cong. 1st Sess. 3 *et seq.* (1973). Thus, individual Fund member cannot be expected to sue the Trustees for dereliction of their duties. Experience has shown that contribution statutes are an effective way of bringing wrongdoers before the Courts. *Northwest Airlines, Inc, supra.*

Prior to the enactment of ERISA, the House Labor sub-committee held numerous hearing in Washington and at various cities

around the country. Again and again the subcommittee found benefits programs which favored a few, self dealing by plan administrators trustees and/or employers, and employees who had worked for decades only to be denied in their old age the benefits they had worked for. In almost every case the victim was the poor employee. In almost every case the perpetrator was the person responsible for managing the employee benefits. H. Rep. No. 533 93rd Cong. 1st Sess. (1973). To combat this problem, ERISA established non delegable duties for fiduciaries and civil and criminal sanctions for violations. And ERISA made a federal forum available for redress of wrongs.

Based on disclosure of malfeasance and improper activities by pension administrators, trustees, or fiduciaries, the Welfare and Pensions Disclosure Act was amended in 1961 to designate theft, embezzlement and bribery as federal crimes when they occurred in connection with welfare and pension plans. H. Rep. No. 533 93rd Cong. 1st Sess. 3 (1973)

Indeed Congress, after a prior comprehensive review of abuses in the administration and investment of private pension funds, adopted the Welfare and Pension Plan Disclosure Act in 1958. H. Rep. No. 533 93rd Cong. 1st Sess. 4 (1973).

However, after a decade of experience Congress found that the "chief procedural weakness (of the Welfare and Pension Plan Disclosure Act) can be found in its reliance upon the initiative of the individual employee to police the management of his plan." H. Rep. 533 93rd Cong. 1st Sess. 4 (1973).

The House Committee on Education and Labor's Report on the Employee Benefit Security Act of 1973, H. Rep. 533 93rd Cong. 1st Sess. 7 (1973) stated:

> "C. *Fiduciary Responsibility And Disclosure.*"
>
> Another area of concern of the Subcommittee has involved the conduct, administration and operations of pension plans. Of particular concern has been the course of conduct in fund transactions, the degree of responsibility required of fiduciaries, the types of persons who can be deemed pension "fiduciaries", and the

standards of accounting they shall be governed by in the management and disposition of pension funds."

The House Committee Found:

"At the time, the safeguarding effect of the fiduciary responsibility will operate efficiently only if fiduciaries are aware that the scope of their dealings will be open to inspection;

* * *

"The fiduciary responsibility section, in essence, codifies and makes applicable to fiduciaries certain principles developed in the evolution of the law of trust. Furthermore, a fiduciary standard embodied in Federal legislation is considered desirable because it will bring a measure of uniformity in an area where decisions under the same set of facts may differ from state to state. It is expected that courts will interpret the prudent man rule and other fiduciary standards bearing in mind the special nature and purpose of employee benefit plans intended to be effectuated by the Act.

* * *

The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws.

* * *

The enforcement provisions have been designated specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redress or preventing violations of the Act. The intent of the Committee is to provide the full range of legal and equitable remedies both in state and federal courts and to remove jurisdiction and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of investments"

* * *

. . . (S)tate law is preempted . . . the Committee believes it essential to provide for a uniform source of law . . . for

> evaluation of fiduciary conduct . . . As indicated previously, the Act expressly authorizes cooperative arrangements with state agencies as well as other federal agencies, and provides that state laws regulating banking, insurance or securities remain unimpaired.

The Senate Subcommittee on Labor of the Sentate Committee on Labor and Public Welfare in 1971 conducted an extensive investigation of employee benefit abuses. Among other instances of abuses which were investigated were abuses in the retail shoe industry in the New York area, the very subject matter of the instant case. Among other witnesses to testify was Murray Finkelstein, a New York shoe salesman, who protested that the Retirement Fund of the Retail Shoe Employees denied him a pension despite almost twenty years of employment. The Subcommittee's report made extensive reference to Finkelstein's plight. S. Rep. No. 634 92nd Cong. 2d Sess. 69, 73, 82, 83 (1971).

Then Secretary of Labor George P. Shultz testified before the House Subcommittee on General Labor in April of 1970 and offered among other examples of fiduciary abuses in the retail shoe industry:

> "He observed that as to one fund, four or five employers appointed trustees borrowed from the Fund and one trustee owed over $62,000 having made no principal or interest payments for more than a year. In another instance, five officers of a corporation, who were the trustees of their pension plan, formed other corporations to retail shoes. The money to finance their outside activities was obtained by loans of up to $460,000 from the pension plan assets to finance their own private ventures.

S. Rep. No. 634 92nd Cong. 2d Sess. (1971). Secretary Shultz chronicled all manners of fiduciary abuse including trustees "milk(ing)" the trusts through exhorbitant fees, loans, or other payments, embezzlement, bribery, insurance commissions, purchases and sales through the trusts. In one example, a Teamster local contracted to purchase land to build housing which the

government found to be largely underwater and consist of primarily rock outcroppings.

Given the very extensive findings and investigations of Congress leading up to the passage of ERISA, including testimony concerning employees in the New York retail shoe industry and abuses of fiduciaries in the retail shoe business, it is inconceivable that Congress intended in ERISA to insulate the Trustees of Retail Shoe from being held accountable for their own wrongs.

It is respectfully submitted that, based on the Committee reports, the reason for preemption of state laws on the subject of fiduciary responsibilities was to establish a uniform nationwide standard for ease of enforceability and because state breach of trust rules related primarily to private testamentary and intervivos trusts rather than employee benefit trust. It is quite clear that a federal fiduciary duty standard applies to all cases whether brought in federal or state court. But the committee reports also make clear that Congress' intent is to provide the full range of legal and equitable remedies in both state and federal court.

It is quite clear that the policing of Pension plans by beneficiaries before ERISA was passed was found by Congress to be insufficient to correct fiduciary abuses.

The New York Court of Appeals held that the pre-emption provisions of ERISA governed the judicial determination of breach of fiduciary duty claims. What apparently was meant is that the federal prudent man definition and standard applies. So much is undisputed. Thus, state laws which set fiduciary standards are preempted. But, New York's Article 14 on its face obviously has nothing to do with fiduciary standards.

The Third-Party Complaint has only a tangential relationship to fiduciary standards. The essence of the Third-Party Complaint is an allocation between various parties to a law suit of proportional liability for an embezzlement. The only relation of the action to fiduciary duties is that some of the alleged wrongdoers are trustees.

The conclusion is overwhelming that the enforcement and preemption provisions of ERISA are designed to remedy and prevent wrongdoing by administrators and trustees such as occurred here. The Third-Party Action furthers that purpose.

The fiduciary duty standard set forth in ERISA, which is conceivably applicable to the Trustees herein, is set forth in ERISA § 414, 29 U.S.C. 404 which states in part:

> "Sec. 404(a)(d) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan . . .
>
> (B) with the case, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with aims.

The Conference Report states in part:

> The conferences expect that the courts will interpret this prudent man rule . . . bearing in mind the special nature and purpose of employee benefit plans.

The Conference Report on Section 502 of ERISA states in part:

> "The U.S. district courts are to have exclusive jurisdiction with respect to actions involving breach of fiduciary responsibility . . . However, with respect to suits which do not involve application of title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. All such actions in Federal or State Court are to be regarded as arising under the laws of the United States in similar fashion to there brought under section 301 of the Labor-Management Relations Act of 1947."

Moreover, this issue of fiduciary standards under the Retail Shoe employee benefit plan is raised by the Plaintiff's Complaint and not by the Third-Party Complaint brought pursuant to CPLR Article 14. The Plaintiff's Complaint alleged that the

Administrator of an employee benefit plan breached his duties as a fiduciary by stealing and that the administrator's conduct was expressly prohibited by ERISA. ERISA 406(b)(1), 29 U.S.C. 1106(b)(1). Thus, as a threshold element of their case, the Plaintiffs must prove that the Administrator violated his fiduciary duties to the Fund. And the standard to be applied post January 1, 1975 is supplied by ERISA. ERISA 514(a), 29 U.S.C. § 1144(a).

For the period before September 1, 1975, the Plaintiffs must also prove as an element of their prima facie case their own freedom from contributory negligence. *Binder* v. *Supermarkets Gen. Corp.*, 49 App. Div. 562, 370 N.Y.S.2d 184 (2d Dept. 1979)(comparative negligence doctrine applies to causes of action accruing prior to September 1, 1975 even if action is commenced subsequent to September 1, 1975); *Bacon* v. *Celeste*, 30 App. Div.2d 324 (1st Dept. 1968); *Craig* v. *Anyon*, 212 App. Div. 55, 208 N.Y.S. 259 (1st Dept. 1925); *aff'd*, 242 N.Y. 569 (1926); Prosser, *The Law of Torts*, 65 at 416-17 (4th ed. 1971) (under doctrine of contributory negligence, the slightest negligence on the part of Plaintiff will bar recovery; proving the absence of his own negligence is a substantive part of the Plaintiff's right to recover).

After September 1, 1975, the Petitioner must prove the Plaintiff's contributory negligence and fault as an affirmative defense. Again, ERISA supplies the standard. ERISA, § 514(a), 29 U.S.C. § 1144(a).

Furthermore, as the reasoned dissent of Judge Kaye pointed out:

> "Appellants have not sought to strike respondents' affirmative defense, which thus remains part of the action, raising the very issues this Court concludes are beyond the jurisdiction of the state court."

Under the affirmative defense of contributory fault, the trier of fact would have to determine the same issue raised in the Third-Party Complaint of whether the Trustees breached their fiduciary duties. The logical conclusion of the Court's reasoning is that the

liability of a negligent Defendant will have progressed from; a) no liability in the event the Plaintiff's is contributorily negligent to; b) liability for Defendant's proportionate culpable conduct to; c) complete and total liability irrespective of the greater fault and culpability of the Plaintiff.

Therefore, the Third-Party Complaint does not introduce any issue involving any breach of fiduciary duty by an employee benefit plan not already raised by the Complaint and Answer.

CONCLUSION

The petition should be granted and the Opinion and decision of the New York Court of Appeals should be reversed.

Respectfully submitted,

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August 15, 1984

APPENDIX

OPINION AND ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATE OF NEW YORK
COURT OF APPEALS

No. 203

RETAIL SHOE HEALTH COMMISSION,
Plaintiff.

and

JACK MALTZ, *et al.*,
Appellants,

v.

CHARLES G. REMINICK, *et al.*,
Respondents.

(and a third-party action.)

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

(203) Arthur D. Felsenfeld & Martin I. Shelton, NY City, for appellant on counterclaim.

Andrew R. Simmonds, Robert E. Meshel & William M. Reid, NY City, for third-party plaintiff/respondents.

Dorit S. Heimer, NY City, for third-party defendant/respondent.

JONES, J.

The preemptive provisions of ERISA govern the judicial determination of breach of fiduciary duty claims against the trustees of an employee welfare benefit plan within the embrace of that Act and preclude actions in state courts for the enforcement of such

claims. Accordingly, where such a plan has brought an action in our State courts against its accountants and consultants for their alleged failure to detect and report substantial misappropriations by the administrator of the plan, our courts are foreclosed from entertaining claims over by the accountants and consultants against the individual trustees of the plan for contribution or indemnity based on allegations that breach of their fiduciary duties by the trustees contributed to the losses sustained by the plan.

In the initial action, Retail Shoe Health Commission, a collectively bargained, multi-employer, jointly administered Welfare Fund, and the individual trustees of the Fund sought to impose liability on Reminick, Aarons & Company, a partnership, and its individual partners on the theory that as public accountants and auditors of the Fund they had failed and neglected to detect and report the misappropriation by Jerome Simon, the administrator of the Fund, of some $765,000 of Fund assets. Reminick then served a third party complaint against the trustees individually and Tolley International Corporation (which had been engaged by the Fund to provide actuarial and consulting services), seeking judgment over by way of contribution or indemnity or both. Tolley thereupon served counterclaims against Reminick, the Fund and the trustees individually as well as a cross claim against the trustees individually, all similarly seeking contribution or indemnification or both.

The individual trustees moved to dismiss the third party complaint of Reminick and the counterclaim and cross claim of Toiley on the ground that the court lacked subject matter jurisdiction of the claims and that Tolley lacked standing to sue. The theory of the motion to dismiss was that the various claims against the individual trustees were governed and controlled by the provisions of the employee Retirement Income Security Act of 1974 (ERISA) and that dismissal was mandated to give effect to the resulting federal preemption.

Supreme Court denied the motion to dismiss, holding that ERISA does not preempt state law when a vital state interest is

involved and is tengential to the employee benefit plan and that the stated causes of action for contribution and indemnification came within such exception. The Appellate Division affirmed without opinion and granted the individual trustees lease to appeal to our Court on a certified question. We reverse.

Inasmuch as it is undisputed that the Fund is an employee welfare benefit plan within the embrace of ERISA (ERISA § 3[1]; 29 USC § 1002[1]), resolution of the issues posed on this appeal turns on the effect the provisions of ERISA have on the claims here sought to be dismissed.

We start with the ineluctable premise that the federal law preempts state regulation of ERISA employee benefit plans. The Act provides expressly that its provisions shall supersede all state laws insofar as they may relate to any employee benefit plan within its embrace.[1] The individual trustees are fiduciaries within the meaning of subdivision 21 of section 3 of ERISA (29 USC § 1002[2]), and the gravamen of the claims of both Reminick and Tolley against them is breach of fiduciary duties (i.e., that the trustees should have known of the embezzlements and defalcations of Simon, that they permitted and condoned his misconduct, that by acts of omission and commission they participated in that misconduct, that they breached their obligation to report such misconduct, and in general that they are liable in consequence of breaches of duty, want of due care, and other fault). As a matter of substantive law, the nature and scope of the duties and liability of the trustees in this regard are determinable under the provisions of ERISA (e.g. ERISA §§ 404, 405; 29 USC §§ 1104, 1105, 1109). It is substantive claims of just this character that fall squarely within the scope and thus the preemption of ERISA.

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[1] ERISA § 514(a), 29 USC § 1144(a), provides in pertinent part:

"(a) * * * [T]he provisions of this subchapter and subchapter III of this chapter shall supersede any and all State Laws insofar as they may now or hereafter relate to any employee benefit plan * * *

(c) For purposes of this section:

(1) the term "State Law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State * * *."

The question then arises as to whether these claims may be asserted in a state court action such as the present. Here again, it is the provisions of ERISA which are determinative. Subdivision (e) of section 502 of ERISA (29 USC § 1132[e])[2] provides that the district courts of the United States shall have exclusive jurisdiction over civil actions arising under ERISA (with an exception not now pertinent). Accordingly, we are obliged to conclude that the present claims asserted by Reminick and Tolley against the trustees may not be entertained in our State courts.

Reminick and Tolley argue that because they do not come within the literal terms of ERISA, § 502(a)[3] which lists the

[2] This provision reads as follows:

"(e)(1) Except for actions under subsection (a)(1)(B) of this section [actions by a participant or beneficiary to recover benefits or to enforce rights under the plan, see fn. 3, *infra*], the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found."

[3] ERISA § 502(a), 29 USC § 1132(a), provides in relevant part:

"Persons empowered to being civil action

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for an appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan or (B) to obtain other

persons empowered to being a civil action under the Act, the congress cannot have intended that ERISA would preclude their claims. This argument is wide of the mark. Inasmuch as ERISA preempts all claims based on alleged breach of fiduciary duty on the part of ERISA trustees and vests jurisdiction for their enforcement exclusively in the federal courts, the circumstance that persons in the outboard position of Reminick and Tolley may have no statutory standing to bring such an action under the federal regulatory scheme is merely an aspect of that scheme. If there is a deficiency or inequity in the scope of section 502(a), it is attributable to the Act itself and any petition for remedy or correction must be addressed to the Congress.

The same response must be made to the arguments of Reminick and Tolley that they are entitled to assert their claims for contribution and indemnity under state law (e.g., CPLR, article 14; *Dole* v. *Dow Chemical Co.*, 30 NY2d 143) in our State courts. The state laws in this regard, too, have been superseded and the claims preempted under ERISA (cf. *Michota* v. *Anheuser-Busch, Inc.*, Nos. 76-193, 77-2543 [D.N.J., decided October 7, 1983, unpublished opinion])

Finally, Tolley argues that there should at least be no dismissal of its claims against the individual trustees to the extent that they arise out of transactions which took place prior to January 1, 1975, the effective date of ERISA. It is accurate to say, of course, that ERISA peemption does not apply with respect to any act or omission which occurred prior to that date (ERISA § 514 [b][1], 29 USC § 1144 [b][1]). Tolley did not, however, (nor did the Fund and the individual trustees in the initial action) plead claims based on pre-1975 transactions separately or seek discrete relief with respect thereto; Tolley's pleading of all claims is lumped in a single cause of action which must stand or, in this instance, fall as a unit. Nevertheless, our dismissal of Tolley's

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appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title * * *."

pleadings now before us is without prejudice to the right of Tolley, if it be so advised, to apply at Supreme court for leave to replead to state separately claims it would assert based on acts and omissions that occurred prior to January 1, 1975.

For the foregoing reasons the order of the Appellate Division should be reversed, with costs, the motion of the individual trustees granted, and the counterclaim, the cross claims, and the third party complaint against them dismissed, without prejudice to the right of Tolley to apply for leave to replead as indicated.

Retail Shoe Health Comm v Reminick

No. 203

KAYE, J. (dissenting)

This case centers on the misappropriation of approximately $675,000 from the Retail Shoe Health Commission (the Fund), an employee welfare benefit plan, by its former administrator, Jerome Simon. The Fund and its individual trustees brought suit in state court against the Fund's former accountants on three theories: first, that the accountants breached their contract to audit the Fund's books and records enabling Simon to divert the funds; second, that the accountants were negligent, resulting in the loss; and third, that they "are obligated to indemnify plaintiffs for their loss." Respondents' affirmative defense[4], cross-claim, counterclaim and third-party claim allege that the trustees themselves failed in their own fiduciary responsibilities to the Fund, which caused or contributed to the loss. By these allegations they seek no affirmative recovery, but only to apportion liability for Simon's tortious conduct among the parties to this action, all of whom allegedly shared responsibility for monitoring the operation of the Fund. The pleadings assert common law claims, and do not mention ERISA.

Assuming the truth of respondent's allegations, as we must on this motion to dismiss, the result reached by the Court allows the

[4] Appellants have not sought to strike respondents' affirmative defense, which thus remains part of the action, raising the very issues this Court concludes are beyond the jurisdiction of the state court.

trustees to escape responsibility for losses due in whole or in part to their own derelictions, and leaves respondents with a potential massive liability and no effective remedy against plaintiffs who are also wrongdoers. I do not belive that ERISA requires this unpalatable result, and therefore would affirm the order below.

ERISA allows a civil action to be brought by the Secretary of Labor or a participant, beneficiary or fiduciary (29 USC § 1132(a)), and in such actions it provides for exclusive federal jurisdiction:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participanta, beneficiary or fiduciary (29 USC § 1132(e)(1)).

A pivotal assumption underlying the majority's holding is that respondents' claims are barred because they are not within the classes of persons authorized to bring a civil action under ERISA. But a claim for relief is not necessarily pre-empted or extinguished because the initiating party falls outside the enumerated categories of section 1132(a). (See *Franchise Tax Bd* v *Construction Laborers Vacation Trust*, ____ US ____, 103 S Ct 2841.)

Nor is the provision for exclusive federal jurisdiction a bar to entertaining respondents' claims. First, that provision applies, by its own terms, only to actions brought by the enumerated persons, which do not include respondents. Second, it is well established that even where statutes pre-empt state law and provide for exclusive federal jurisdiction state courts may, applying federal law, decide issues necessary to the resolution of state causes of action (*Hathorn* v *Lovorn*, 457 US 255, 266 & n. 18; *Pan Am Co.* v *Superior Court*, 366 US 656, 664-65). Though the exclusive jurisdiction provision of ERISA might prohibit the commencement of a state court action seeking affirmative relief against the trustees for their derelictions as trustees, it still would not prevent the state court from considering such questions when they are part and parcel of defenses to a cause of action premised

on state law. (See, e.g., *Weiner* v *Shearson*, 521, F2d 817; *Shareholders Mgmt Co.* v *Gregory*, 449 F2d 326; *Birenbaum* v *Bache & Co.*, 555 SW2d 513 [Tex App]). The same rationale should apply here. Sustaining respondents' claims against the trustees would not alter substantive rights created by ERISA or disturb any allocation of responsibility among employers subject to ERISA (*Michota* v *Anheuser-Busch, Inc.*, Nos. 76-193, 77-2543 [D. N.J., decided October 7, 1983, unpublished opinion]), but would simply allow respondents to maintain apportionment claims in one action, as is common in tort cases in the state courts.

Since the result reached by the courts below complied with the state law and transgressed no overriding federal interest, I vote to affirm.

* * * * * *

Order reversed, with costs, motion of the individual trustees granted, and the counterclaim, cross claims and third party complaint against them dismissed, without prejudice to the right of Tolley International Corporation to apply for leave to replead as indicated in the opinion herein. Question certified answered in the negative.

Opinion by Judge Jones in which Judges Jasen, Meyer and Simons concur. Judge Kaye dissents and votes to affirm in an opinion in which Chief Judge Cooke and Judge Wachtler concur.

Decided May 17, 1984

ORDER OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 12, 1983.

Present—HON. JOSEPH P. SULLIVAN, *Justice Presiding*
DAVID ROSS
MAX BLOOM
ARNOLD L. FEIN
FRITZ W. ALEXANDER, II, *Justices*

RETAIL SHOE HEALTH COMMISSION,
Plaintiff,

and JACK MALTZ, ALFRED WACHTEL, JULES ARONSON and MELVIN KRAUSS, as Trustees of RETAIL SHOE HEALTH COMMISSION,
Plaintiffs-Appellants,

—against—

CHARLES G. REMINICK, HERBERT M. BRITTON, BERNARD SPEAR, and PETER BLITZER, individually and doing business as REMINICK, AARONS & COMPANY,
Defendants.

CHARLES G. REMINICK, HERBERT M. BRITTON, BERNARD SPEAR, and PETER BLITZER, individually and doing business as REMINICK, AARONS & COMPANY,
Third-Party Plaintiffs-Respondents,

—against—

JACK MALTZ, ALFRED WACHTEL, JULES AARONSON, MELVIN KRAUSS and JOSEPTH BINEBAUM,
Third-Party Defendants-Appellants,

and TOLLEY INTERNATIONAL CORPORATION,
Third-Party Defendant-Respondent,

and THE ESTATE OF HAROLD JACOBSON and BASIL CASTOVINCI ASSOCIATES, INC.,
Third-Party Defendants.

An appeal having been taken to this Court by the plaintiffs-appellants and third-party defendants-appellants from the order of the Supreme Court, New York County (Maresca, J.), entered on February 24, 1982, which denied their motion to dismiss the third-party complaint and the cross-claim and counterclaim.

And said appeal having been argued by Arthur D. Felsenfeld, of counsel for the appellants, by Dorit S. Heimer, of counsel for third-party defendant-respondent, and by Michael P. Weiner, of counsel for third-party plaintiffs-respondents; and due deliberation having been had thereon.

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed. Respondents shall recover of appellants one bill of $75 costs and disbursements of this appeal.

DECISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

SUPREME COURT—NEW YORK COUNTY SPECIAL TERM—PART 1

Index No. 15430/80
#129 of 10/14/81

RETAIL SHOE HEALTH COMMISSION, and JACK MALTZ, ALFRED WACHTEL, JULES ARRONSON and MELVIN KRAUSS, as Trustees of Retail Shoe Health Commission,

Plaintiffs,

—against—

CHARLES G. REMINICK, HERBERT, M. BRITTON, BERNARD SPEAR, and PETER BLITZER, individually and doing business as REMINICK, AARONS & COMPANY,

Defendants.

CHARLES G. REMINICK, HERERT, M. BRITTON, BERNARD SPEAR, and PETER BLITZER, individually and doing business as REMINICK, AARONS & COMPANY,

Third-Party Plaintiffs,

—against—

JACK MALTZ, ALFRED WACHTEL, JULES ARRONSON MELVIN KRAUSS, THE ESTATE OF HAROLD JACOBSON, JOSEPH BINENBAUM, TOLLEY INTERNATIONAL CORPORATION, and BASIL CASTOVINCI ASSOCIATES, INC.,

Third-Party Defendants.

MARESCA, J.:

The issue presented in this motion for dismissal of the third-party complaint, counterclaim and cross-claim is whether the third-party plaintiffs are precluded from pleading cause of action for contribution and/or indemnification of CPLR Article 14

under the pre-emptive provisions of ERISA. (U.S. Code Tit. 29). The statutory right of contribution under CPLR Article 14 is neither in conflict with nor pre-empted by provisions of ERISA. Therefore, the court has subject matter jurisdiction over the third-party complaint and cross-claims.

I

This action arises in connection with defalcations by the deceased Jerome Simon former Administrator of the Retail Health Commission (The Fund), from the fund during the period 1972 through 1979. The fund is an "employee welfare benefit plan" within the meaning of § 3 of ERISA, 29 U.S.C. § 1002(1). The defalcations, discovered in December, 1979, were accomplished primarily by Simon's preparation of duplicate vouchers with respect to claims submitted by Fund beneficiaries.

The firm of Reminick, Aarons & Co. (third-party plaintiffs Reminick) served as certified public accountants for the fund from 1972 to March, 1980, and also served as Simon's personal accountants.

The fund, by its trustees (the plaintiff's herein) seek damages against defendants and third-party plaintiffs Reminick for breach of their agreement as accountants; as well as for failing to properly perform their duties whereby Simon was permitted to continue to manage the fund and, as a result, the fund sustained damages. The trustees charge Reminick with liability for damages and seek indemnification for the loss to the fund.

Reminick filed a third-party complaint claiming entitlement to indemnity and/or contribution from the trustees and Tolley and Basil Castrovinci Associates. In substance Reminick alleges that any damages to the fund were caused by the fraud, negligence and breach of duty of Tolley (constitutes to the fund during the period 1972 to 1977) and Castrovinci (consultants to the fund during the period 1978 to present).

Tolley counterclaimed and cross-claimed against the trustees and Reminick for contribution and/or for their indemnification for their respective alleged breach of duty and negligence.

The trustees in the instant motion seek dismissal of the third-party complaint, counterclaim and cross-claim on the theory that the court lacks subject matter jurisdiction and the parties lack standing to sue. (CPLR 3211 [a] [2] [3] [7]).

II

The trustees rely on two separate sections of ERISA for the proposition that this court lacks subject matter jurisdiction of the third-party complaint, counterclaim and cross-claim and that Reminick and Tolley lack standing to sue. It is first argued that ERISA generally pre-empts all state statutes which affect the regulation of pension plans.

ERIISA § 514 (a), 29 U.S.C. § 1144(a) provides in part:

> "(a) . . . [T]he provisions of this subchapter and subchapter III of this title shall supercede any and all State Laws insofar as they may now or hereafter relate to any employee benefit plan . . .
>
> (c) For purposes of this section:
>
> (1) The term "State Law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State . . ."

The trustees next argue that irrespective of the pre-emptive provisions that Reminick and Tolley lack standing to litigate their respective claims in this court. The assert neither nor Tolley fall within the narrow group of persons authorized to bring a civil action under ERISA. Persons authorized to bring a civil action under the Act are expressly set forth in ERISA § 502(a), 29 U.S.C. § 1132(a) which provides in relevant part:

"Persons empowered to being civil action

> (a) A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the

plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the secretary, or by a participant, beneficiary or fiduciary for an appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title . . ."

III

Reminick and Tolley argue that the trustees' pre-emption argument must fail for several reasons. First, the action is based in part on acts or omissions which occurred prior to January 1, 1975, ERISA's effective date, and ERISA expressly disclaims pre-emption of such actions, ERISA § 514(a) and (b)(1), 29 U.S.C. § 1144(a) and (b)(1). Second, the claims for contribution and/or indemnity do not arise under ERISA and thus are not within the "exclusive jurisdiction" of the federal courts and so are not pre-empted by ERISA, § 502(e)(1), 29 U.S.C. § 1132(e)(1) because the claims are based on state laws which reflect significant state interests which do not directly affect ERISA—regulated plans, ERISA § 514(a), 29 U.S.C. § 1144(a).

IV

The court need not reach the issue of the retroactivity of ERISA of alleged pre-1975 breaches of fiduciary duty nor the question of standing by the trustees for reasons indicated below.

A review of Congressional intent and the myriad of case law makes it eminently clear that state regulation of ERISA pension

plans are pre-empted. (*Malone* v *White Motor Corp.*, 435 U.S. 497; *Hewlett-Packard Co.* v *Barnes*, 425 F. Supp. 1294; *Morrissey* v *Curran*, 567 F2d 546; *Marshall* v *Chase Manhattan Bank [National Association]* 558 F2d 680; *Guthrie* v *Dow Chemical Co.*, 445 F. Supp. 311; *Cate* v *& Blue Shield of Alabama*, 434 F. Supp. 1187; *Bell* v *Employee Security Benefit Association*, 437 F. Supp. 382). The purpose of the pre-emption provision was to insure that ERISA plans were uniformly governed by federal legislation and not subject to various state regulations and/or interpretations.

A closer analysis of the purposes of ERISA's pre-emption shows that a state statute will be pre-empted only when it tends to invade an aspect of the regulation of pension funds that is governed by ERISA. The regulation will not be pre-empted when a vital state interest is involved and such interest is tangential to an employee benefit plan. (see: *Cornell Mfg.* v *Mushlin*, 70 AD2d 123; *Providence* v *Valley Clerks Trust Fund*, 509 F. Supp. 388).

Thus courts have permitted actions involving recovery of money judgments (*National Bank* v *Elec. Workers*, 69 AD2d 679) from pension plans; and recovery in domestic relation actions (*Stone* v *Stone*, 450 F. Supp. 919).

The cause of actions involved here are for contribution and/or indemnification. New York has maintained that the right to seek recovery among joint tortfeasors is of significant interest to insure fairness in enforcement of judgments. Further Article 14's purpose is for protection of joint tortfeasors and in no way is involved with the regulation of ERISA plans. As such, Reminick and Tolley's actions are tangential in nature and are not pre-empted under ERISA. The state interest is tantamount here, for if we were to follow plaintiff's reasoning Reminick and Tolley would be faced with the risk of total liability whether or not they were found to be totally liable.

Accordingly, the motion is denied.

Dated: February 17, 1982

Office-Supreme Court, U.S.
FILED
SEP 17 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES G. REMINICK, HERBERT M. BRITTON, BERNARD SPEAR, and PETER BLITZER, individually and doing business as REMINICK, AARONS & COMPANY,

Petitioners,

—against—

JACK MALTZ, ALFRED WACHTEL, JULES AARONSON, MELVIN KRAUSS and JOSEPH BINENBAUM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

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ARTHUR D. FELSENFELD

QUESTION PRESENTED

Whether state courts lack subject matter jurisdiction to adjudicate claims based upon alleged breaches of duty by fiduciaries of an employee benefit plan covered by ERISA where such claims are asserted as third-party claims for contribution and/or indemnity.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-322

CHARLES G. REMINICK, HERBERT M. BRITTON, BERNARD SPEAR, and PETER BLITZER, individually and doing business as REMINICK, AARONS & COMPANY,

Petitioners,

—against—

JACK MALTZ, ALFRED WACHTEL, JULES AARONSON, MELVIN KRAUSS and JOSEPH BINENBAUM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

RELEVANT STATUTES

The relevant statutes, in addition to those cited by petitioners, are as follows:

ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1):

(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

ERISA § 409(a), 29 U.S.C. § 1109(a):

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

SUMMARY OF ARGUMENT

This case is inappropriate for review on writ of certiorari. No "special and important reasons" for granting review are presented nor does the decision of the New York State Court of Appeals conflict with the decisions of this Court, federal courts of appeals, or of other state courts of last resort.

To the contrary, the decision of the New York Court of Appeals sought to be reviewed is entirely consistent with

ERISA's legislative history and with the decisions of this and other courts which have firmly established that state courts lack subject matter jurisdiction to adjudicate claims of breach of fiduciary duty against trustees of ERISA plans.

In light of the overwhelming authorities uniformly holding that state courts lack subject matter jurisdiction over such claims, the issue raised herein can hardly be considered either unsettled or novel. What is unprecedented, however, are petitioners' attempts to alter the well-settled jurisdictional bounds of the state court by inviting such court to evaluate the conduct of ERISA fiduciaries in the context of third-party claims for contribution and/or indemnity.

The Petition fails to address the numerous decisions recognizing ERISA's broad pre-emption of state law and, indeed, does not even mention this Court's decision in *Alessi* v. *Raybestos - Manhattan, Inc.*, 451 U.S. 504 (1981). Nor do petitioners substantiate their contention that claims for contribution and indemnity come within any of the recognized narrow exceptions to ERISA's pre-emption. Instead, petitioners advance a series of arguments, none of which warrant departure from the well-established principles already articulated by this Court.

ARGUMENT

I. PETITIONERS FAIL TO SATISFY THE STANDARDS GOVERNING REVIEW ON CERTIORARI

Rule 17.1 of the Rules of the Supreme Court of the United States states: "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." In the instant case there are no reasons—special and important or otherwise—for granting the writ.

Rule 17.1(b) indicates that certiorari may be granted "[w]hen a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last

resort or of a federal court of appeals." No such conflict exists herein nor do petitioners attempt to establish the existence of any such conflict.

Furthermore, the New York Court of Appeals has not "decided an important question of federal law which has not been . . . settled by this Court, or . . . in a way in conflict with the applicable decisions of this Court." Rule 17.1(c).

To the contrary, the decision of the New York Court of Appeals is consistent with well-established principles of federal pre-emption under ERISA. Reaffirmation of those principles by this Court is, we submit, unnecessary.

II. STATE COURTS LACK SUBJECT MATTER JURISDICTION TO ADJUDICATE CLAIMS BASED ON ALLEGED BREACHES OF DUTY BY TRUSTEES OF AN EMPLOYEE BENEFIT PLAN COVERED BY ERISA

The Congressional findings and declaration of policy codified at 29 U.S.C. § 1001 conclusively establish that Congress recognized that there was a serious national problem with respect to employee benefit plans and that a *uniform* and manageable solution was required. In formulating such a solution, Congress declared it to be its policy

> . . . to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, *by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.*

29 U.S.C. § 1001(b) (emphasis added).

The ERISA legislation enacted by Congress in response to its findings and to fulfill its policy declarations has recently been

described by this Court as a " 'comprehensive and reticulated statute' which Congress adopted after careful study of private retirement . . . plans." *Alessi* v. *Raybestos - Manhattan, Inc.*, 451 U.S. 504 (1981), quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S 359, 361, *reh'g denied*, 448 U.S. 908 (1980). As noted by the Court in *Alessi*, "[t]o ensure that employee pension expectations are not defeated, [ERISA establishes rules] for employee participation, §§ 1051-1061; funding standards to increase solvency of pension plans §§ 1081-1085; *fiduciary standards for plan managers, §§ 1101-1114*; and an insurance program in case of plan termination, §§ 1341-1348 . . ." 451 U.S. at 510 n.5 (emphasis added). Similarly, this Court in *Shaw* v. *Delta Air Lines, Inc.*, ____ U.S. ____, 103 S. Ct. 2890, 2896-7 (1983), noted that ERISA "sets various uniform standards, including rules concerning . . . fiduciary responsibility, for both pension and welfare plans."

The broad federal pre-emption of state regulation of employee benefit plans which are covered by ERISA has been uniformly and widely accepted. *Shaw* v. *Delta Air Lines, Inc.*, *supra*, 103 S. Ct. at 2900; *Alessi* v. *Raybestos - Manhattan, Inc.*, *supra*, 451 U.S. at 510; *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, *supra*, 446 U.S. at 361; *Malone* v. *White Motor Corp.*, 435 U.S. 497, 512 (1978) (plurality opinion), *aff'd*, 444 U.S. 911 (1979); *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danziger*, 709 F.2d 815, 830 (3d Cir. 1983), *rev'd on other grounds*, 52 U.S.L.W. 5042 (1984); *Stone & Webster Engineering Corp.* v. *Ilsley*, 690 F.2d 323, 329 (2d Cir. 1982); *Marshall* v. *Snyder*, 430 F. Supp. 1224, 1230-31 (E.D.N.Y. 1977), *aff'd in part and remanded*, 572 F.2d 894 (2d Cir. 1978); *Hewlett-Packard Co.* v. *Barnes*, 425 F. Supp. 1294 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502, 504 n.4 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978) ("Congress unmistakably intended ERISA broadly to pre-empt state regulations of ERISA regulated employee benefit plans"); *Morrissey* v. *Curran*, 567 F.2d 546, 549 (2d Cir. 1977); *Marshall* v. *Chase Manhattan Bank (Na-*

tional Association), 558 F.2d 680, 683 (2d Cir. 1977); *Azzaro* v. *Harnett*, 414 F. Supp. 473 (S.D.N.Y. 1976), *aff'd*, 553 F.2d 93 (2d Cir.), *cert. denied*, 434 U.S. 824 (1977); *Guthrie* v. *Dow Chemical Co.*, 445 F. Supp. 311, 313-14 (S.D. Texas 1978) (emphasis added) (ERISA indicates "a clear intent on behalf of the Congress to pre-empt the entire area of regulation of all covered pension plans. . . Congress intended to reserve a federal authority the *sole power* to regulate the field of covered employee benefit plans"); *Cate* v. *Blue Cross & Blue Shield of Alabama*, 434 F. Supp. 1187, 1190 (E.D. Tenn. 1977) ("Having established a new body of federal rights and obligations, Congress added to the jurisdiction of the federal courts in order to further the legislative purpose. For this reason, it pre-empted state laws insofar as they related to employee benefit plans"); *Bell* v. *Employee Security Benefit Association*, 437 F. Supp. 382, 387 (D. Kan. 1977) ("we conclude that federal pre-emption in the area of pensions and other employee benefit programs is virtually total"); *Kerbrow* v. *Kerbrow*, 421 F. Supp. 1253, 1260 (N.D. Texas 1976) ("Congress intended the Act to supersede any and all state laws regulating employee benefit plans").

Furthermore, an examination of the plain language of ERISA and the legislative history underlying enactment of ERISA conclusively "shows that Congress intended *absolute preemption of the field* of employee benefit plans." *Azzaro* v. *Harnett*, *supra*, 414 F. Supp. at 474 (emphasis added).

ERISA § 514, 29 U.S.C. § 1144 provides in relevant part:

> (a) . . . [T]he provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . .
>
> * * *
>
> (c) For purposes of this section:

> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. . . .

This Court has recently stated that "the breadth of § 514(a)'s pre-emptive reach is apparent from that section's language." *Shaw* v. *Delta Air Lines, Inc.*, *supra*, 103 S. Ct. at 2899-2900.

As discussed by the court in *Bell* v. *Employee Security Benefit Association*, *supra*:

> . . . *we believe that the legislative history indicates that this wording was meant to convey just as broad a concept of preemption as appears on the face of the statute.*
>
> 'The original House and Senate versions of ERISA provided for preemption of state law. But the broader preemption provision which was eventually incorporated into ERISA was developed in conference committee.
>
> 'The joint explanatory statement of the conference committee indicated just how broad the preemption provision was meant to be:
>
> > Preemption of State Laws (Sec. 514 of the bill)
> >
> > Under the substitute, the provisions of title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce. . . .
>
> 'In introducing the conference report, Senator Harrison Williams, Chairman of the Senate Committee on Labor and Public Welfare, made the following statement:
>
> > It should be stressed that with the narrow exceptions specified in the bill, *the substantive and enforcement provisions of the conference substitute are intended to preempt the field of Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee*

> *benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.* [1974] U.S. Code Cong. & Admin. News, pp. 5188-89.

'Senator Javits, ranking minority member of the Senate Committee on Labor and Welfare, explained the reasoning of the conference committee in broadening the preemption provision:

> Both House and Senate bills provided for preemption of State law, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.
>
> Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, *the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs.* The conferees—recognizing the dimensions of such a policy—also agreed to assign the Congressional Pension Task Force the responsibility of studying and evaluating preemption in connection with State authorities and reporting its findings to the Congress. If it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made. 120 Cong. Rec. 29942 (1974).

'The importance of the preemption provision was highlighted by Representative John Dent, Chairman of the Subcommittee on Labor of the House Committee on Labor and Education:

> *Finally I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans.* With the preemption of the field, we round out the protection afforded participants by *eliminating the threat of conflicting and inconsistent State and local regulation.*
>
> *The conferees*, with the narrow exceptions specifically enumerated, *applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans. Thus, the provisions of section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof*—including any professional society or association operating under color of law—*which would affect any employee benefit plan* as described in section 4(a) and not exempt under section 4(b).

In light of this legislative history, we conclude that federal preemption in the area of pensions and other employee benefit programs is virtually total. 437 F. Supp. at 386-88 (emphasis added).

In *Azzaro* v. *Harnett*, *supra*, the Court added:

> Preemption of the field was intended to provide for uniform regulation of employee benefit plans. The Report of the House Education and Labor Committee states:
>
> > 'Except where plans are not subject to this Act and in certain other enumerated circumstances, state law is preempted. *Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law* in

> the areas of vesting, funding, insurance and portability standards, *for evaluation of fiduciary conduct*, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports. [1974] U.S. Code Cong. & Admin. News p. 4655.'

414 F. Supp. at 474 (emphasis added).

In *Hewlett-Packard Co.* v. *Barnes*, *supra*, the Court, after thorough analysis of the legislative history underlying ERISA, concluded (425 F. Supp. at 1300):

> Overall, the legislative history reveals both that Congress carefully considered the question of preemption, including the feasibility of enacting a more limited preemption provision, and that Congress ultimately enacted Section 514(a) with the express purpose of summarily preempting state regulation of ERISA-covered employee benefit plans. That the statute, standing alone or buttressed by its legislative history, was intended to supersede state regulation of benefit plans such as plaintiffs' is indisputable.

Consistent with the federal policies hereinabove discussed, it is well-established that, with a limited exception not pertinent herein,[1] state courts are absolutely precluded from adjudicating claims relating to employee benefit plans which are regulated by ERISA. *See, e.g., Delta Air Lines, Inc.* v. *Kramarsky*, 666 F.2d 21 (2d Cir. 1981), *aff'd in part, and vacated in part sub. nom. Shaw* v. *Delta Air Lines, Inc.*, *supra*; *Morrissey* v. *Curran*, *supra*; *Marshall* v. *Chase Manhattan Bank (National Association)*, *supra*.

The reasoning behind state court pre-emption was stated by the Second Circuit in *Marshall* v. *Chase Manhattan Bank (N.A.)*, *supra*, as follows:

---

1 ERISA § 502(e)(1) confers concurrent jurisdiction on state and federal courts only over actions brought under ERISA 502(a)(1)(B)—civil actions by "a participant or beneficiary" to recover benefits or to enforce or clarify his rights under the terms of a plan.

> . . . surely the interpretation of a federal statute providing for exclusive jurisdiction in the federal courts presents a federal question to be decided by that court and not the state tribunal . . . The superior federal interest sought to be vindicated here is clear from §§ 502 and 514 of the Act as well as its legislative history which establish the congressional intent that the United States regulate the field of employee benefit plans eliminating the threat of conflicting and inconsistent local regulation.

558 F.2d at 683.

The absolute preclusion of state court adjudication of any claim governed by the provisions of ERISA applies with full force to claims such as those asserted in the third-party complaint alleging breach of duty by the fiduciaries of an employee benefit plan. Such claims are expressly covered by ERISA. ERISA § 404(a), 29 U.S.C. § 1104(a) provides in relevant part:

> (a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. . . .

ERISA § 409(a), 29 U.S.C. § 1109(a) imposes civil liability upon trustees of an employee benefit plan for breach of the duties set forth in ERISA § 404(a).

Both federal and state courts have uniformly agreed that federal courts have exclusive jurisdiction to adjudicate such claims for breach of duty by a fiduciary. *See Central States, Etc.* v. *Old Security Life Insurance Co.*, 600 F.2d 671, 676 (7th Cir. 1979) ("[t]hat the federal courts have exclusive jurisdiction over ERISA claims for breach of fiduciary duty is settled"); *Morrissey* v. *Curran*, *supra*, 567 F.2d at 549 ("under the exclusive jurisdictional provisions of ERISA, that claim [breach of fiduciary duty] could be made nowhere else"); *O'Neil, et al.* v. *Marriott Corp., et al.*, 538 F. Supp. 1026, 1034 (D.Md. 1982); *Hopkins, et al.* v. *FMC Corp., et al.*, 535 F. Supp. 235 (W.D.N.C. 1982); *Wong* v. *Bacon*, 445 F. Supp. 1177, 1185, 1187 (N.D. Cal. 1977) ("Congress gave federal courts exclusive jurisdiction over claims involving breach of fiduciary duties. . . ."); *Young* v. *Sheet Metal Workers' International Association Production Workers Welfare Fund (New York), et al.*, 112 Misc. 2d 692, 447 N.Y.S.2d 798 (Sup. Ct. Nassau Co. 1981); *Zink* v. *Heiser*, 109 Misc. 2d 354, 363, 438 N.Y.S.2d 209 (Sup. Ct. Queens Co. 1981); *Hunacek* v. *Union Welfare Fund Local 202*, 100 Misc. 2d 740, 743, 746, 420 N.Y.S.2d 156 (Sup. Ct. Queens Co. 1979); *Smith* v. *Crowder Jr. Company*, 280 Pa. Super. 626, 421 A.2d 1107 (1980); *Goldberg* v. *Caplan*, 277 Pa. Super. 47, 419 A.2d 653, 657 (1980) ("Were state laws (and actions) not preempted, trustees would be subject to the threat of conflicting and inconsistent regulation by state and federal authorities"). As the court stated in *Wong* v. *Bacon*, *supra*:

> The appropriateness of a federal, as distinguished from state, forum is signalled by Congress' decision in § 502(e)(1) to give federal courts exclusive jurisidiction over claims involving breach of fiduciary duties. Congress wanted federal courts to elaborate the broad fiduciary standards laid down in ERISA. . . .

445 F. Supp. at 1185-6 (citations and footnote omitted).

Turning to the facts and allegations in this case, there is no dispute that the Fund involved herein constitutes an employee welfare benefit plan within the meaning of § 3(1) of ERISA, 29

U.S.C. § 1002(1),[2] and is therefore subject to regulation under that Act. There is also no dispute that the third-party defendant trustees are fiduciaries within the meaning of section 3 of ERISA.[3]

As is clear from a review of the third-party complaint the gravamen of the claims asserted are alleged breaches of duty by the third-party defendant trustees.

In the instant case, the defalcations were allegedly made by the Fund's administrator, Jerome Simon, directly and exclusively from Fund assets. The claims against the trustees are based on alleged breaches of duties of care, clearly the type of claims within the exclusive purview of ERISA. The First Cause of Action in the third-party complaint alleges breaches by the trustees of various alleged duties including, *inter alia*, duties of management, investment and to oversee, review and participate in the financial affairs of the Fund. And the Second

---

2 29 U.S.C. § 1002(1) provides:

> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

3 ERISA § 3(21), 29 U.S.C. § 1002(21) provides in relevant part:

> (A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

Cause of Action explicitly alleges that "Third Party Defendant (Trustees) owed a *fiduciary* duty to the Plaintiff . . . in their capacity as Trustees" (emphasis added).

Thus, it is clear that the third-party claims against the trustees go to the heart of ERISA's fiduciary provisions and intrude upon an area expressly addressed by ERISA. In this respect the instant case stands in marked contrast to the cases cited by petitioners in which state laws were held not pre-empted by ERISA (Petition, pp. 9-10, fn. 1).[4]

Similarly misplaced is petitioner's reliance (Petition, p. 11) on this Court's decision in *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, ____ U.S. ____, 103 S. Ct. 2841 (1983) and, in particular, on the Court's observation in that case that ERISA § 514

> "makes clear that Congress did not intend to preempt entirely every state cause of action relating to such plans. With important, but express limitations, it states that 'nothing in this subchapter shall be construed to relieve any person from any law of any State which regulates insurance, banking, or securities.' " 103 S. Ct at 2855.

By contrast, claims seeking contribution or indemnity do not come within any of the "narrow exceptions" to pre-emption under § 514(a). *Cf.*, *Shaw* v. *Delta Air Lines, Inc.*, *supra*, 103 S. Ct. at 2902.

---

4 Among the authorities cited by petitioners are cases arising in a domestic relations context, despite the well-settled principle that where state domestic relations law is involved, a finding of federal pre-emption must be supported by a higher standard of proof, *McCarty* v. *McCarty*, 453 U.S. 210, 220 (1981); *Stone & Webster Engineering Corp.* v. *Ilsley*, *supra*, 690 F.2d at 329. Petitioners also rely on pre-*Alessi* cases wherein Courts based their decisions on the finding that the state laws involved had only an *indirect* effect on ERISA plans. *See*, *e.g.*, *Provience* v. *Valley Clerks Trust Fund*, 509 F. Supp. 388 (E.D. Cal. 1981). However, this Court in *Alessi* v. *Raybestos - Manhattan, Inc.*, held that it was immaterial that state law intrudes *indirectly*, rather than *directly*, into an area of exclusive federal concern. "ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern." 451 U.S. at 525.

Petitioners next argue, without a shred of support that ERISA "implicitly makes clear" that third parties can bring claims in state court relating to breaches of fiduciary duties. While petitioners rely on ERISA §§ 410 and 412 (relating to insurance and bonding of fiduciaries), there is nothing in either of those sections which supports petitioners' bald assertion that an insurer can sue a trustee for breach of fiduciary duty in state court (Petition, p. 13). Moreover, even if such a suit could be brought in state court, petitioners overlook the explicit exception from pre-emption in ERISA § 514 for state laws relating to insurance. Again, there are no exceptions, explicit or otherwise, for actions seeking contribution or indemnity.

Petitioners suggest that if claims against trustees cannot be asserted in state court then the purposes of New York's contribution law will be defeated (Petition, p. 14). However, New York's highest court has already rejected this argument and, we respectfully submit, there is no need for further review of this issue by this Court. Furthermore, the New York Court of Appeals obviously did not invalidate New York's contribtuion law in the face of ERISA's pre-emption. Rather, the Court merely recognized that the subject matter jurisdictional limitations of the state courts may not be ignored simply because claims of breach of duty against fiduciaries are couched as claims for contribution and indemnity.

Petitioners also err in urging that the decision of the New York Court of Appeals would allow the trustees to "escape responsibility" and "is contrary to the purpose and intent of ERISA" (Petition, p. 15). First, the trustees have not been permitted to "escape responsibility," but rather are subject to suit in federal court in accordance with the provisions of ERISA § 502.[5] Second, the decision of the New York Court of Appeals is entirely consistent with the purpose and intent of ERISA to insure uniform standards for enforcement of fiduciary obligations.

---

5 Significantly, petitioners fail to disclose that simultaneously with the filing of the instant Petition with this Court, they have also petitioned for removal of the entire case to the United States District Court for the Southern District of New York.

By contrast, to permit petitioners to assert their claims against the trustees in state court would lead to anomalous and unprecedented results. On one hand, state courts are absolutely precluded from interpreting and applying ERISA's fiduciary standards to the claims against the trustees and we are unaware of any state court which has ever done so. On the other hand, for a state court to apply state law standards to determine whether ERISA trustees breached their fiduciary duties would run afoul of the explicit pre-emption provisions of ERISA § 514, 29 U.S.C. § 1144, and would create the conflicting and inconsistent state regulation of ERISA plan fiduciaries that Congress strived to avoid.

Thus, it is clear that it is *petitioners' position* which is contrary to the purpose and intent of ERISA. Indeed, if the conduct of trustees is to be judged by different rules depending upon whether the claims against them are brought as primary claims or as third-party claims for contribution, the uniformity sought to be achieved by Congress in enacting ERISA will be totally eviscerated.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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FILED
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ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-322

IN THE

Supreme Court of the United States

October Term 1984

CHARLES G. REMINICK, HERBERT M. BRITTON, BERNARD SPEAR, and PETER BLITZER, individually and doing business as REMINICK, AARONS & COMPANY,

Petitioners,

—against—

JACK MALTZ, ALFRED WACHTEL, JULES ARRONSON, MELVIN KRAUSS and JOSEPH BINENBAUM,

Respondents.

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONER IN RESPONSE TO BRIEF FOR RESPONDENTS IN OPPOSITION

The Respondents' Brief apparently concedes that ERISA allows a subrogated surety or fidelity insuror to bring an action for breach of fiduciary duty. Respondents maintain, however, that such claims must be brought in federal court. Respondents further claim the Petitioners' third-party action must be brought in federal court. Respondents' Brief p. 15.

Respondents also claim incorrectly that the Petitioner have removed the instant action to federal court. The Petitioners served upon Respondents' counsel a petition for removal, but did not proceed to petition the court. Instead the Petitioners have notified the parties that they would not at this time seek to remove the instant action. The Petitioners intend instead to consolidate the instant action with certain newly discovered state court actions.

Respondents' position that subrogated surety and fidelity insurors' and the Petitioners' claims should be brought in federal court is incorrect for several reasons. There is presently pending in the Supreme Court of the State of New York, New York County a consolidated action entitled as follows:

Supreme Court of the State of New York
COUNTY OF NEW YORK

RETAIL SHOE HEALTH COMMISSION, and JACK MALTZ, ALFRED WACHTEL, JULES ARRONSON and MELVIN KRAUSS, as Trustees of RETAIL SHOE HEALTH COMMISSION, *Plaintiffs,*	**Index No.: 7306/80**
-against-	**ACTION #1**
MANUFACTURERS HANOVER TRUST COMPANY, *Defendant.*	

MANUFACTURERS HANOVER TRUST COMPANY,

Third-Party Plaintiff,

-against-

BANKERS TRUST COMPANY, BANK LEUMI TRUST COMPANY OF NEW YORK, LONG ISLAND TRUST COMPANY, CHASE MANHATTAN BANK, N.A., CHEMICAL BANK, EUROPEAN AMERICAN BANK AND TRUST COMPANY, NATIONAL BANK OF NORTH AMERICA, WEST SIDE FEDERAL SAVINGS AND LOAN ASSOCIATION OF NEW YORK CITY, CITIBANK, N.A., THE BANK OF NEW YORK, THE FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver of FRANKLIN NATIONAL BANK, JAMES BELTON and MARGARET BELSKY,

Third-Party Defendants.

BANKERS TRUST COMPANY,

Fourth-Party Plaintiff.

-against-

ELEANOR SIMON, Individually and ELEANOR SIMON, as Administratrix of the Estate of JEROME M. SIMON, deceased,

Fourth-Party Defendants.

CITIBANK, N.A.,

Fourth-Party Plaintiff.

-against-

BOWERY SAVINGS BANK,

Fourth-Party Defendant.

CHEMICAL BANK,
Fourth-Party Plaintiff,

-against-

EMIGRANT SAVINGS BANK,
Fourth-Party Defendant.

BANK LEUMI TRUST COMPANY OF NEW YORK,
Fourth-Party Plaintiff,

-against-

BARRISTER SHOE, INC.,
Fourth-Party Defendant.

NATIONAL BANK OF NORTH AMERICA,
Fourth-Party Plaintiff,

-against-

FRED SILVERMAN and LORE SILVERMAN,
Fourth-Party Defendants.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of Franklin National Bank,
Fourth-Party Plaintiff,

-against-

BARRISTER SHOE, INC.,
Fourth-Party Defendant.

Supreme Court of the State of New York
COUNTY OF NEW YORK

RETAIL SHOE HEALTH COMMISSION, and JACK MALTZ, ALFRED WACHTEL, JULES ARRONSON and MELVIN KRAUSS, as Trustees of RETAIL SHOE HEALTH COMMISSION,
Plaintiffs,

-against-

BANKERS TRUST COMPANY,
Defendant.

Index No.: 7305/80

ACTION #2

BANKERS TRUST COMPANY,
Defendant and, Third-Party Plaintiff,

-against-

ELEANOR SIMON, Individually, and ELEANOR SIMON, as Administratrix of the Estate of JEROME M. SIMON, Deceased,
Third-Party Defendant.

Supreme Court of the State of New York
COUNTY OF NEW YORK

RETAIL SHOE HEALTH COMMISSION, and JACK MALTZ, ALFRED WACHTEL, JULES ARRONSON and MELVIN KRAUSS, as Trustees of RETAIL SHOE HEALTH COMMISSION,
Plaintiffs,

-against-

ELEANOR SIMON, Individually and as Administratrix of the Estate of JEROME M. SIMON, PHILIP SIMON and IRVING SIMON,
Defendants.

Index No.: 10529/80

ACTION #3

Supreme Court of the State of New York
COUNTY OF NEW YORK

RETAIL SHOE HEALTH COMMISSION, and JACK MALTZ, ALFRED WACHTEL, JULES ARRONSON and MELVIN KRAUSS, as Trustees of RETAIL SHOE HEALTH COMMISSION, *Plaintiffs,* *-against-* BARRISTER SHOE, INC. also known as FEMINETTE SHOE STORE, and BARRISTER SHOE CORP. *Defendants.*	**Index No.:** **ACTION #4**

[1]

In that consolidated action in Action #3 the Respondents Jack Maltz, Alfred Wachtel, Jules Arronson and Melvin Krauss and Retail Shoe Health Commission ("Retail Shoe") have sued the Estate of Jerome M. Simon for among other things "breach of the fiduciary duty said Jerome M. Simon owed to Retail Shoe".[2] Thus, Respondents have done just what they claim is prohibited by ERISA, i.e. bring a suit in state court raising issues of breach of fiduciary duty.

If, as Respondents suggest, claims (other than claim made by beneficiaries) which raise issues relating to breach of fiduciary duty must be brought in the federal court, then the Respondents' claims against the Estate of Simon must be brought in federal

1. New York unlike in the federal system does not require that a subrogated insuror be name as a real party in interest. Fed. R. Civ. Pro. 17; Civil Practice Law and Rules ("CPLR") 1004. However, there is little doubt as to the real or chief party in interest. The Aetna Casualty & Surety Company ("Aetna") and Respondent Retail Shoe have filed a claim against the Estate of Jerome M. Simon in the Surrogates Court, Kings County and Aetna's lawyers are prosecuting the action against the Estate of Simon in the New York Supreme Court.

2. The related state court action only recently came to the Petitioners attention. The Respondents did not advise the Petitioners that there were any other related proceedings. However, the third-party defendant actuary of Retail Shoe, Tolley International, in its brief to the New York Court of Appeals raised the issue that Retail Shoe had apparently by not proceeded against the Estate of Jerome Simon. The Respondents chose not to respond to this allegation.

court. However, there is nothing to indicate that Congress intended to federalize broad areas of state law dealing with subrogation, contributory and comparative negligence, the Uniform Contribution between Joint Tortfeasors Act, the Uniform Commercial Code, the "collateral source rule" and its exceptions as well as the New York Estates Powers and Trust Law, the New York Surrogates Court Procedure Act, New York common law doctrines, etc. *See, Sante Fee Industries* v. *Green*, 429 U.S. 814 (1970).

The available Congressional history makes clear that the purpose of Congress in preempting state laws under ERISA was to regulate the field of employee benefits. HR2, 93rd Cong. 2d Sess., 120 Cong. Rec. 29, 197 (Aug. 20, 1974). Congress intended to eliminate the threat of conflicting and inconsistent state and local regulation. *Id.* To achieve this purpose Congress followed to a large extent the approach it had taken in § 1243, the preemption provision of the Health Maintenance Organization Act of 1973, 42 U.S.C. § 300 e-10. § 1243 of the Health Maintenance Organization Act of 1973 sought to promote health care by preempting restrictive state laws such as those which gave doctors control of the management of Health Maintenance Organizations. 1973 U.S. Code Cong. and Adm. News, pp. 305-60.

Thus, it was apparently in that context that Congress in August of 1974 discussed the preemption provisions of ERISA. Senator Taft inquired of Senator Javits whether state bar associations were preempted by ERISA from adopting and enforcing ethical rules or guidelines or disciplining member of the bar. Senator Javits responded that ERISA did not preempt bar associations from adopting or enforcing ethical rules or discipling members. However, bar associates were preempted from regulating legal service plans. Senator Williams opined that bar association rules which might affect the substance or operation of prepaid legal service plans were preempted and employers and unions under ERISA were free to develop and operate legal service plans. HR2 93rd Cong. 2d Sess. 120 Cong. Rec. 29,949 (Aug. 22,

1974). Congress never considered preemption in the context of a claim for contribution in a negligence action.

It is respectfully submitted the instant action is a simple negligence action in which an employer and/or its fidelity insuror seeks to recover allegedly defalcated funds. The fact that a welfare fund is the employer in this case is mere happenstance and should not be controlling for jurisdictional purposes. *See, e.g., Key Appliance Inc.* v. *National Bank of North America*, 75 App. Div. 2d, 428 N.Y.S.2d 238 (1st Dept. 1980) (an employee defalcation action involving the employer, employees, a bank, a bank employee and firm of certified public accountants); *Nat. Surety Corp.* v. *Lybrand*, 256 App. Div. 226, 9 N.Y.S.2d 54 (1st Dept. 1939) (an employee defalcation action in which the subrogated surety sued the employer's accountant); *Craig* v. *Anyon*, 212 App. Div. 55, 208 N.Y.S. 259 (1st Dept. 1925); (employer's action against auditor for employee's defalcations barred by employer's negligence); *see also* McLaughlin, Prac. Co., *McKinney's Cons. Laws of N.Y.*, 7B CPLR 1401:3, pp. 362-363; compare *Michota* v. *Anheuser-Busch*, Nos. 76-193, 77-2543 (D.N.J. Oct. 7, 1983) (an action by an employee involving an employer's duty to contribute to an employee benefit plan).

Finally, under the well pleaded complaint rule it appears that the instant action cannot be removed to federal court. *Franchise Tax Board* v. *Const. Laborers Vac. Trust*, _____ U.S. _____, 103 S. Ct. 2841 (1983). While Petitioners argued before the New York Court of Appeals that issues of breach of fiduciary duty were raised by the Respondents' complaint, the majority opinion of the Court of Appeals disagreed. As the majority and dissenting opinions also pointed out, there is no explicit federal jurisdictional basis for the Petitioners to bring civil claims in federal court alleging breach of fiduciary duty. ERISA § 502(a), 29 U.S.C. § 1132(a).

CONCLUSION

The petition should be granted and the opinion and decision of the New York Court of Appeals should be reversed.

Respectfully submitted,

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November 15, 1984

No. 84-322 (4)

Office - Supreme Court, U.S.
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MAR 21 1985
ALEXANDER L. STEVAS.

In the Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES G. REMINICK, ET AL., PETITIONERS

v.

JACK MALTZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether ERISA precludes maintenance of an action in state court for contribution and indemnity brought against trustees of an employee benefit plan premised on their alleged breach of fiduciary duty.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-322

CHARLES G. REMINICK, ET AL., PETITIONERS

v.

JACK MALTZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATUTES INVOLVED

1. Section 514 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144, provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, the provisions of [29 U.S.C. 1001-1145 and 29 U.S.C. 1301-1461] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in [29 U.S.C. 1003(a)] and not exempt under [29 U.S.C. 1003(b)]. * * *
>
> * * * * *
>
> (c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. * * *

2. Section 502 of ERISA, 29 U.S.C. 1132, provides in pertinent part:

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

* * * * *

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

STATEMENT

The Retail Shoe Health Commission (the Fund) is an employee welfare benefit plan covered by the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* In an action filed in state court in New York, the Fund, along with its trustees, the respondents here, sued petitioners, members of a public accounting firm that provided services to the Fund, for damages resulting from petitioners' alleged negligence. The alleged negligence took the form of the accountants' failure to detect the misappropriation of $765,000 in Fund assets by Jerome Simon, the Fund's administrator. Petitioners then initiated a third party action seeking contribution and/or indemnification under New York's contribution law from respondents and Tolley International Corporation (Tolley), a company that provided actuarial services to the Fund. Tolley, in turn, initiated counterclaims against petitioners, respondents and the Fund, and a cross claim against respondents, all seeking contribution and/or indemnification. The various complaints do not mention ERISA (Pet. App. 6a).

Respondents moved to dismiss petitioners' third party complaint, as well as the counterclaim and cross claim pending against them on the ground that these state claims were preempted by ERISA (Pet. App. 2a). The state trial court denied the motion to dismiss (Pet. App. 11a-15a), reasoning that the availability of the state cause of action for contribution and indemnification is of "significant interest" to the state, whereas the issue is "tangential" to ERISA (*id.* at 15a). The Appellate Division, First Department, affirmed without opinion (*id.* at 9a-10a).

A divided New York Court of Appeals reversed (Pet. App. 1a-8a), holding that because the "gravamen of the claims of both Reminick and Tolley against [the trustees] is breach of fiduciary duties" (Pet. App. 3a), these claims are governed by ERISA. Because United States district courts have exclusive jurisdiction over actions alleging breach of fiduciary duty under ERISA (29 U.S.C. 1132(e)), the Court of Appeals concluded that claims asserted against the trustees may not be heard in the state courts (Pet. App. 4a).

The Court of Appeals also rejected petitioners' argument that Congress's failure to expressly provide parties such as petitioners with a cause of action under ERISA signaled an intent to allow maintenance of contribution actions in state court (Pet. App. 4a-5a). Assuming without deciding that the absence of explicit authorization in ERISA for such contribution actions would prevent petitioners from pressing their claims in any court, the court explained (*id.* at 5a):

> Inasmuch as ERISA preempts all claims based on alleged breach of fiduciary duty on the part of ERISA trustees and vests jurisdiction for their enforcement exclusively in the federal courts, the circumstance that persons in the outboard position of [petitioners] and Tolley may have no statutory standing to bring such an action under the federal regulatory scheme is merely an

> aspect of that scheme. If there is a deficiency or inequity in the scope of [29 U.S.C. 1132(a)], it is attributable to the Act itself and any petition for remedy or correction must be addressed to the Congress.

In a dissenting opinion joined by two other members of the court (Pet. App. 6a-8a) Judge Kaye argued that the state contribution action was not barred simply because persons in petitioners' position were not explicitly authorized to maintain a civil action under ERISA (Pet. App. 7a). Judge Kaye reasoned further that although ERISA might prohibit the commencement of an independent action in state court asserting a breach of fiduciary duty by trustees it does not prevent the state courts from "considering such questions when they are part and parcel of defenses to a cause of action premised on state law" (Pet. App. 7a-8a).

DISCUSSION

In our view the New York Court of Appeals correctly determined that ERISA precludes maintenance of a state court action for contribution and indemnity against employee benefit plan trustees that would impose liability on the trustees for alleged breaches of fiduciary duty. Moreover, the court below correctly held that contribution actions such as the present one may be brought, if at all, only in a United States district court under ERISA. The decision below is consistent with the language and legislative history of ERISA.

In any event, the decision of the New York Court of Appeals is, so far as we are aware, the only reported appellate decision addressing the question presented by this case. The ruling below does not conflict with any decision of this Court, or of any United States court of appeals or state court of last resort. Further review accordingly is unwarranted.

1.a. The preemption mandate of ERISA is of unrivaled breadth. Section 514 of ERISA expressly preempts "any and all State laws" that "relate to any employee benefit plan" covered by ERISA. 29 U.S.C. 1144(a). For this and other statutory purposes "employee benefit plan" is defined to include both pension plans and welfare benefit plans. 29 U.S.C. 1002(3). The Act defines the terms "State law" and "State" broadly to include all state action — including judge-made doctrines and court decisions — having the effect of law that "purport[] to regulate, directly or indirectly, the terms and conditions of employee benefit plans." 29 U.S.C. 1144(c). The only statutory exceptions to this broad preemption principle accommodate state laws regulating insurance, banking, or securities, generally applicable state criminal laws, and the Hawaii Prepaid Health Care Act. 29 U.S.C. 1144(b). None of these exceptions is said to be applicable here. See Pet. 11-12.

As the Court recognized in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522-525 (1981), the expansiveness of the preemptive effect of Section 514 is an important feature of the comprehensive regulatory scheme established in ERISA. Subject to the few exceptions explicitly created by the Act, Congress "meant to establish * * * plan regulation as exclusively a federal concern." *Id.* at 523. Both direct and indirect intrusion on the area of exclusive federal authority was barred: "ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the preemption provision." *Id.* at 525. As the Court remarked in *Shaw* v. *Delta Airlines, Inc.*, No. 81-1578 (June 24, 1983), "[t]he breadth of § 514(a)'s preemptive reach is apparent from the section's language": state laws are superseded to the extent that they "relate[] to" any employee benefit plan (slip op. 10). Preemption thus is not limited to "state laws specifically designed to affect employee benefit plans" or even those "dealing with subject

matters covered by ERISA" (*id.* at 11). Nor is it necessary to establish that "the state law[] frustrat[es] congressional intent"; rather the courts must give effect to the plain language of ERISA's preemption provision, it being clear that Congress intended that the exercise of preemption authority be read broadly and non-technically. *Id.* at 10 n.15, 11. In view of its expansive reach, the Court has described Section 514 as a "virtually unique preemption provision" (*Franchise Tax Board* v. *Construction Laborers Vacation Trust*, No. 82-695 (June 24, 1983), slip op. 22 n.26).

b. The legislative history of ERISA confirms that Congress intended to occupy the field with respect to ERISA-covered employee benefit plans by superseding any and all state laws and causes of action affecting such plans. See *Shaw* v. *Delta Airlines, Inc.*, slip op. 11-13. The broad preemption language of Section 514 of ERISA emerged from the Conference Committee. The Committee deliberately rejected the preemption formulations employed in earlier House and Senate versions of the bill, which ousted state regulation only as to matters actually to be regulated under ERISA.[1] The crucial change made by the Conference Committee was to preempt all state laws *relating to plans* covered by the Act, as opposed to those governing *subjects* covered by the Act. In his statement prior to Senate action on the Conference Committee bill, Senator Javits, a principal sponsor of the legislation, explained the concern of the conferees with respect to the adequacy of the scope of the

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[1]See H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 383 (1974). Compare Section 514 of H.R. 2, 93d Cong., 2d Sess. (1974), as passed by the House of Representatives, *reprinted in* Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 4057-4058 (Comm. Print 1976) [hereinafter cited as *Leg. Hist.*]; Section 699 of H.R. 2, as passed by the Senate. *Leg Hist.* 3820.

preemption provisions found in the earlier bills (120 Cong. Rec. 29942 (1974)):

> Both the House and Senate bills provided for preemption of State law, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.
>
> Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs.

In sum, to assure uniform regulation of employee benefit plans, to provide a clear and effective bulwark against application of inconsistent state laws affecting plan operation, and to avoid extensive litigation concerning the scope of preemption, Congress embodied in ERISA an extremely far-reaching preemption provision. In the view of its sponsors, the breadth of federal preemption was "the crowning achievement" of the legislation (120 Cong. Rec. 29197 (1974) (remarks of Rep. Dent)).

2. a. The New York Court of Appeals correctly determined that Section 514(a) of ERISA precludes maintenance of a state court action to recover contribution or

indemnity from fund trustees in the circumstances of this case. Relying on New York's contribution law, N.Y. Civ. Prac. Law § 1401 *et seq.* (McKinney 1976), petitioners attempt to impose liability on Fund trustees for various alleged breaches of fiduciary duty that are claimed to have contributed to the losses sustained by the Fund. Petitioners now apparently concede (Pet. 19) that ERISA must provide the substantive fiduciary standards for adjudicating such liability, but they contend that the ERISA standards can be applied by a state court in a contribution action under state law, and that such a hybrid proceeding is not preempted. Petitioners fail to recognize, however, that a state law affording a right of contribution necessarily "relate[s] to" an employee benefit plan within the meaning of Section 514(a) because such a right may be employed to fix liability on plan trustees for breach of fiduciary duty. The application of such a law accordingly is preempted regardless of whether it directly frustrates federal policies respecting pension plans.

As we have explained (pages 6-7, *supra*), the Court has interpreted the statutory phrase, "relate to any employee benefit plan," in a broad literal fashion. Application of New York's contribution law runs afoul of Section 514 of ERISA because it would dictate the instances in which fiduciaries and others are to be liable to one another for breach of the fiduciary duties imposed by ERISA. Such a suit is no different, for preemption purposes, from an original cause of action against fund fiduciaries. A right to contribution or indemnification, if it exists at all, must be found in ERISA, at least insofar as the right is asserted to remedy an alleged breach of fiduciary duty. See pages 11-12, *infra*. Otherwise, trustees would be subject to differing state contribution laws—and thus differing fiduciary liabilities—depending on the state in which they operate and the state or states in which such actions might be

brought. Congress preempted state law under Section 514(a) precisely to free plans and their trustees from such inconsistent and varying legal requirements.

By contrast, the original cause of action by respondents and the Fund against petitioners for negligent provision of professional services to the Fund, is not, in our view, preempted under ERISA. That suit apparently did not allege either that petitioners were fiduciaries who breached their duty of care, or that they knowingly participated in or aided and abetted fiduciaries in committing fiduciary breaches. Compare Pet. 20-21 (complaint alleged as background to suit that plan administrator breached *his* fiduciary duty); see *Thornton* v. *Evans*, 692 F.2d 1064, 1077-1078 (7th Cir. 1982). The critical distinction between respondents' action against petitioners and the responsive claim for contribution is that the former does not seek to affix liability for breach of fiduciary duty.

b. Even though there is no explicit provision for such actions in the statute, the Secretary of Labor has taken the position that actions may be brought in federal district court under ERISA for contribution and indemnification, either among fiduciaries or as between fiduciary and non-fiduciary parties at fault. See *Donovan* v. *Robbins*, 752 F.2d 1170, 1178-1179 (7th Cir. 1985); see also G. Bogert, *The Law of Trusts and Trustees* § 701, at 195-198; *id.* § 862 at 35-39; *id.* § 868, at 82-83 (1982 ed.); Restatement (Second) of Trusts § 258, at 650-654 (1959). Assuming that all of the elements of a typical contribution claim can be established here (see *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 87-88 (1981)), the trustees may, in

our view, be sued for contribution in federal court under ERISA by persons such as petitioners.[2]

Thus petitioners' contention (Pet. 15-19) that the decision below permits trustees to escape responsibility for malfeasance is unfounded. But even if our view as to the availability of contribution in federal court were to prove incorrect, petitioners' position would not be advanced. First, trustees plainly may be sued by the Secretary as well as by plan participants and beneficiaries seeking redress for any breach of fiduciary duty under ERISA. See 29 U.S.C. 1132(a)(2). Thus, even if contribution were unavailable in the federal courts, fiduciary breaches or oversights need not go unredressed. Second, whether or not ERISA allows for a contribution action, state law may not supplement or vary the allocation of financial responsibility established under the federal scheme.

3. a. Assuming that ERISA itself allows for a contribution action to be governed by federal fiduciary standards, such an action can only be maintained in federal court. The New York Court of Appeals correctly recognized (Pet. App. 4a) that any contribution action against Fund fiduciaries that can be brought under ERISA must be heard in federal court. See 29 U.S.C. 1132(e)(1); *Morrissey* v. *Curran*, 567 F.2d 546, 549 (2d Cir. 1977). Congress clearly intended that the federal district courts have exclusive

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[2]In the compass of the present submission we do not undertake to present the argument for implying a right to contribution under ERISA in the federal courts. We note, however, that at least one of the factors that counseled against recognition of a right of contribution in *Northwest Airlines*—the purely statutory nature of the primary liability there (see 451 U.S. at 93-94, 97)—is absent here. Both the action for damages for negligence by petitioners in their accounting services and the cause of action for damages against a trustee for breach of fiduciary duty were recognized at common law.

jurisdiction over suits "involving breach of fiduciary responsibility as well as exclusive jurisdiction over other actions to enforce or clarify benefit rights provided under Title I." H.R. Conf. Rep. 93-1280, *supra*, at 327. Indeed, the Conference Committee, in mandating exclusive federal jurisdiction over such cases, rejected provisions in both the House and Senate bills that would have provided concurrent state and federal court jurisdiction over suits for breach of fiduciary duty.[3]

We recognize that Section 502(e)(1) of ERISA, 29 U.S.C. 1132(e)(1), could be read to leave a loophole for a contribution action such as this in the otherwise general assignment of exclusive jurisdiction over actions arising under ERISA to the federal courts. That is, because the contribution action is not one brought "by the Secretary, or by a participant, beneficiary or fiduciary," the statutory grant of exclusive jurisdiction arguably is not, on its face, applicable. But the legislative history that we have cited clearly reflects Congress's intention that the federal courts exercise exclusive jurisdiction in all matters involving breach of fiduciary responsibility. And it is significant that Congress took care explicitly to establish a single exception to the general rule of exclusive federal jurisdiction: concurrent jurisdiction exists to entertain actions by a participant to recover benefits due under the terms of a benefit plan, 29 U.S.C. 1132(a)(1)(B) and (e). Obviously no similar exception exists for contribution actions. Nor is this difference in the treatment of the two kinds of actions hard to understand. Benefit collection actions, unlike contribution actions, do not require the court to assess liability for breach of federal

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[3]See Section 503(g)(1) of H.R. 2, 93d Cong., 2d Sess. (1974), as passed by the House of Representatives, *Leg. Hist.* 4047-4048; Section 693 of H.R. 2, as passed by the Senate. *Leg. Hist.* 3816-3817.

fiduciary responsibility standards. Thus, to the extent that a federal contribution action may arise under ERISA, the language and policy of 29 U.S.C. 1132(e)(1) require that it be entertained only in federal court.

b. In their argument defending the exercise of state court jurisdiction in this case, petitioners assume (Pet. 12-13) that an insurer may bring a suit in state court against a fiduciary under Section 410 of ERISA, 29 U.S.C. 1110. Section 410 requires that any fiduciary liability insurance policy purchased by a plan for its fiduciaries permit recourse by the insurer against the fiduciary. We agree with respondents' suggestion (Pet. 13) that Section 410 tends to confirm that ERISA may in some circumstances permit maintenance of an action for breach of fiduciary duty by persons other than those enumerated in 29 U.S.C.1132(a). (Section 410 may thus lend some support to the availability of a contribution claim under ERISA itself. See pages 10-11, *supra*.) But it does not at all follow that such suits may be brought in state court. To the contrary, because an insurer's recourse suit rests on subrogation to the plan's claim for breach of duty against a fiduciary, the exclusive jurisdiction provisions of 29 U.S.C. 1132(e)(1) should be directly applicable. See 29 U.S.C. 1132(a)(2), 1109. Similarly, to the extent that a contribution action similarly rests on a subrogation theory —as petitioners assert it does (Pet. 13)—their argument for exercise of state court jurisdiction is undermined, rather than advanced.

Petitioners also rely (Pet. 11) on decisions indicating that a grant of exclusive jurisdiction to the federal courts does not preclude a state court from deciding a federal question that arises "collaterally." See *Hathorn* v. *Lovorn*, 457 U.S. 255, 266 & n.18 (1982). The claim for contribution asserted here, however, is not in any sense a "collateral" incident of a bona fide state action addressed to legitimate state concerns. Rather, it is the essence of the state claim to establish

the liability of respondents as plan trustees for breach of fiduciary duties. Maintenance of this third party claim accordingly draws no support from cases in which a defense of illegality under federal law is permitted to be interposed to a claim that particular conduct is required under state law (see *Bement* v. *National Harrow Co.*, 186 U.S. 70 (1902)), or in which a suit is brought to enforce state contract rights that are affected to some extent by a federal rate schedule (see *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656 (1961)).[4]

4.a. As we noted at the outset, the decision of the court below does not conflict with any pertinent reported decision of an appellate court. To the contrary, in situations generally analogous to the present case, the federal courts of appeals have given a broad reading to ERISA's preemption provision. See, *e.g.*, *Russell* v. *Mass. Mutual Life Ins. Co.*, 722 F.2d 482, 487-488 (9th Cir. 1983), cert. granted on other grounds, No. 84-9 (Oct. 1, 1984) (state causes of action based on mishandling of disability claim preempted);[5] *Lafferty* v. *Solar Turbines Int'l*, 666 F.2d 408 (9th Cir. 1982) (state breach of contract action relating to administration of plan preempted); *Dependahl* v. *Falstaff Brewing Corp.*, 653 F.2d 1208, 1214-1216 (8th Cir.), cert. denied, 454 U.S. 968 (1981) (state claim of tortious interference with plan preempted).

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[4]Petitioners advert (Pet. 21-22) to the question whether, assuming the state court lacks jurisdiction to entertain their contribution action, they may nonetheless raise a defense of contributory negligence based on respondent's acts or omissions in the state court action brought by respondents against petitioners. The court below did not address this issue and we express no view regarding it at this time.

[5]The question presented to this Court in No. 84-9 is whether, under ERISA, punitive damages may be awarded to an employee benefit plan participant from a plan fiduciary based on the fiduciary's failure properly to process benefit claims. There is no reason to hold this case for disposition in light of No. 84-9.

Cases cited by petitioners (Pet. 9-10 n.1) do not create any conflict with the decision below that would warrant further review. Petitioners rely on a line of cases recognizing a narrow exception to ERISA preemption that permits garnishment of plan benefits to enforce family support and community property obligations embodied in a state divorce decree. See, *e.g.*, *A.T. & T. Co.* v. *Merry*, 592 F.2d 118 (2d Cir. 1978). The rationale for that exception can in no event be extended to a case such as this. In *Shaw* (slip op. 14 n.21) the Court cited *Merry* as illustrating that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan" within the meaning of Section 514(a) of ERISA. But the effect of imposing fiduciary liability under state contribution law can scarcely be deemed peripheral to the operation of an employee benefit plan.[6] Petitioners also cite cases holding that state fair employment practices laws escape preemption, but these cases have been superseded or qualified by *Shaw*, which teaches that such laws survive as to employee benefit plans only to the extent that they provide a means of enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and accordingly are sheltered by Section 514(d) of ERISA, 29 U.S.C. 1144(d).[7] Thus petitioners are unable to identify any unimpeached appellate decision that conflicts with the decision below.

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[6]The garnishment cases are also distinguishable because they reflect the traditional reluctance of the courts to find federal preemption of state law pertaining to marriage or the family. See *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 581 (1979).

[7]Another case cited by petitioners, *Hotel & Restaurant Employees* v. *Danziger*, 536 F. Supp. 317 (D.N.J. 1982), was reversed on appeal, 709 F.2d 815 (3d Cir. 1983). This Court subsequently vacated the court of appeals' ERISA ruling on the ground that the preemption question was not ripe. *Brown* v. *Hotel Employees*, No. 83-498 (July 2, 1984), slip op. 19-20. The reasoning of still other cases cited by petitioners, such as *Provience* v. *Valley Clerks Trust Fund*, 509 F. Supp. 388 (E.D. Cal.

b. An additional reason for withholding further review in this case is that the question whether an action for contribution under ERISA may be maintained in federal court remains an open one. See pages 10-11, *supra*. Although the availability of such a federal remedy is not essential to the conclusion that a state action for contribution is barred, it is impossible to assess the practical effect of preemption of state contribution actions absent further development of the law regarding the availability of contribution under ERISA itself. Significantly, the thrust of petitioners' argument that the court below erred is simply that some mechanism for securing contribution is desirable (see Pet. 14-20), rather than that the mechanism must be supplied by state law or be made available through the state courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

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MARCH 1985

1981), to the effect that the indirectness of the impact of state law on an employee benefit plan is sufficient to avert preemption, has been repudiated by *Alessi* and *Shaw*. See pages 5-6, *supra*.

DOJ-1985-03

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MAR 25 1985

(5)

No. 84-322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES G. REMINICK, HERBERT M. BRITTON, BERNARD SPEAR, and PETER BLITZER, individually and doing business as REMINICK, AARONS & COMPANY,

Petitioners,

—against—

JACK MALTZ, ALFRED WACHTEL, JULES AARONSON, MELVIN KRAUSS and JOSEPH BINENBAUM,

Respondents.

MOTION AND BRIEF OF BANKERS TRUST COMPANY, DEFENDANT AND THIRD-PARTY DEFENDANT IN PENDING RELATED CASES, FOR LEAVE TO INTERVENE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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March 21, 1985

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In The
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OCTOBER TERM 1984
No. 84-322

CHARLES G. REMINICK, HERBERT M. BRITTON, BERNARD SPEAR and PETER BLITZER, Individually and doing business as REMINICK, AARONS & COMPANY,

Petitioners,

—against—

JACK MALTZ, ALFRED WACHTEL, JULES AARONSON, MELVIN KRAUSS and JOSEPH BINENBAUM,

Respondents.

MOTION OF BANKERS TRUST COMPANY, DEFENDANT AND THIRD-PARTY DEFENDANT IN PENDING RELATED CASES, FOR LEAVE TO INTERVENE AND IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

Bankers Trust Company (hereinafter "Bankers Trust") moves pursuant to Rule 42 of this Court for leave to file a brief as an interested party urging this Court to grant the petition for a writ of certiorari and reverse the decision of the Court of Appeals.

The petition for certiorari was filed on August 15, 1984. On October 9, 1984, this Court requested the Solicitor General of the United States to present his views on the case. The Office of the Solicitor General has not yet filed its position.

Subsequent to the filing of this petition and without notice to Bankers Trust, the New York Supreme Court granted a motion consolidating this action with the previously consolidated four other lawsuits pending in the New York Supreme Court. Justice McCooe granted the motion by the petitioners for an order of consolidation under the New York CPLR stating, "The

liability, if any, of all parties to the plaintiff arising out of the same fact pattern should be determined on one action." (A copy is annexed as an appendix to this brief).

Bankers Trust, as can be seen from the caption in the four consolidated cases, referred to in the petitioner's Reply Brief at pages 1 through 5, is a third-party defendant and fourth-party plaintiff in action no. 1 and a defendant and third-party plaintiff in action no. 2.

Bankers Trust is a commercial bank and is frequently involved in litigation with respect to items deposited by its customers with the bank. In the decision below, the New York Court of Appeals held that ERISA preempts and prohibits a third-party claim in a state court action for contribution and indemnity against the trustees of an employee benefit fund for their breaches of duty in detecting the "misappropriation of approximately $675,000 from the Retail Shoe Health Commission ("The Fund"), an employee welfare benefit plan, by its former administrator, Jerome Simon." (A.6a). The Fund is an "employee welfare benefit plan" within the meaning of Section 3 of ERISA, 29 U.S.C. Section 1002(1).

Bankers Trust, which is now, or soon will be, a party in the consolidated actions, believes the decision below was erroneous for the reasons set forth in the accompanying brief.

Bankers Trust Company, thus, respectfully prays that the court grant this motion for leave to intervene and file its brief.

Respectfully Submitted,

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March 21, 1985

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984
No. 84-322

CHARLES G. REMINICK, HERBERT M. BRITTON, BERNARD SPEAR and PETER BLITZER, Individually and doing business as REMINICK, AARONS & COMPANY,

Petitioners,

—against—

JACK MALTZ, ALFRED WACHTEL, JULES AARONSON, MELVIN KRAUSS and JOSEPH BINENBAUM,

Respondents.

BRIEF OF BANKERS TRUST COMPANY, DEFENDANT AND THIRD-PARTY DEFENDANT IN PENDING RELATED CASES, FOR LEAVE TO INTERVENE AND IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

Bankers Trust Company (hereinafter "Bankers Trust") moves pursuant to Rule 42 of this Court for leave to file a brief as an interested party urging this Court to grant the petition for a writ of certiorari and reverse the decision of the New York Court of Appeals.

This petition is taken from the opinion and order of the New York Court of Appeals, reported in 62 N.Y. 2d 173, which held that ERISA preempts and prohibits a third-party claim in a state court action for contribution and indemnity against the trustees of an employee benefit fund for their breaches of duty in detecting the "misappropriation of approximately $675,000 from the Retail Shoe Health Commission ("The Fund"), an

employee welfare benefit plan, by its former administrator, Jerome Simon." (A.6a).[1] The Fund is an "employee welfare benefit plan" within the meaning of Section 3 of ERISA, 29 U.S.C. Section 1002(1).

As set forth in the moving affidavit of Jack Maltz, the chairman of the Fund, in support of the motion to dismiss the third-party complaint here at issue at paragraphs 4 and 5: (See A.12a; R.29).

> "Mr. Simon died on September 16, 1979. . . . Simon's defalcations, first discovered after discrepancies in check vouchers surfaced in December 1979, were accomplished primarily by Simon's preparation of duplicate vouchers with respect to claims submitted by Fund beneficiaries. Based on these duplicate vouchers, checks were issued and endorsements were forged by Simon, and were negotiated by him, in most cases at Bankers Trust Company."

Simon, the administrator of the Fund's plan, was covered under an indemnity bond of Aetna Casualty & Insurance Co. (hereinafter "Aetna"). Aetna's lawyers, on behalf of themselves and the Fund, filed claims against the estates of Simon and his widow, Eleanor Simon, in the Surrogates Court, Kings County.

Subsequent to the filing of this petition and without notice to Bankers Trust, the New York Supreme Court granted a motion consolidating this action with the previously consolidated four other lawsuits pending in the New York Supreme Court. Justice McCooe granted the motion by the petitioners for an order of consolidation under New York CPLR stating, "The liability, if any, of all parties to the plaintiff arising out of the same fact pattern should be determined on one action." (A copy is annexed as an appendix to this brief at page 13).

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[1] "A" followed by a number refers to the Appendix to the petition for a writ of certiorari; "R" followed by a number refers to the Record filed with the New York Court of Appeals.

The Fund and its individual trustees brought a series of lawsuits in the New York State Courts against various banks, the widow and estate of the dishonest employee, a recipient of the checks, and its former accountants, the petitioners herein. These now consolidated five actions to which Bankers Trust is a party are as follows:

(1) The Fund and its individual trustees instituted the first action against its depository payor bank, Manufacturers Hanover Trust Company (hereinafter "MHT"), to recover $675,634 by virtue of alleged forged endorsements. MHT instituted a third-party complaint against Bankers Trust and various other banks claiming that Bankers Trust and such other banks had guaranteed all prior endorsements on various checks drawn on MHT. MHT seeks to recover from Bankers Trust $621,297.00 of the $675,634.00 sought by the Fund in this action.

Bankers Trust interposed an answer denying liability and asserting various affirmative defenses including: the Fund's own negligence substantially contributed to the making of any forged or unauthorized signatures sued on herein and, therefore, the Fund was precluded from asserting liability by virtue of Section 3-406 of the Uniform Commercial Code; the checks had been issued to a fictitious payee, i.e. an agent or employee of the maker or drawer of the checks referred to in the complaint supplied the maker with the name of the payee intending the latter to have no such interest and, therefore, endorsement by any person in the name of the named payee was effective under paragraph 3-405(1)(b) and (c) of the Uniform Commercial Code; the plaintiff failed to comply with the duties imposed upon it by failing to examine the checks furnished to it; the plaintiff was barred from recovery by virtue of Section 4-406 of the Uniform Commercial Code when it did not, within one year from the time of the statement and items were made available to the customer or did not, within three years from that time, discover and report any unauthorized endorsements; and the plaintiff, as well as its accountants, auditors and other officials were neg-

ligent in failing to detect such alleged improper check endorsements since December 1, 1972.

Because the checks in controversy had been deposited in a joint account maintained by the late Mr. Simon and his wife, Eleanor Simon, at Bankers Trust, Bankers Trust instituted a fourth party action against Eleanor Simon, individually and Eleanor Simon as Administratrix of the Estate of Jerome Simon claiming that the Simons had jointly warranted all prior endorsements of checks deposited in their account. At the same time, Bankers Trust cross-claimed over against Bank Leumi claiming that Bank Leumi had deposited with Bankers Trust and warranted the endorsements of ten items to Bankers Trust. Nine of these ten items had initially been deposited at Bank Leumi by Barrister Shoe, Inc. Bank Leumi proceeded to institute a fourth-party action against Barrister Shoe, Inc.

(2) The second of the previously consolidated actions was instituted by the Fund and its individual trustees against Bankers Trust to recover the sum of $597,526.50 representing the aggregate sum of several hundred checks deposited and/or encashed by Bankers Trust on the alleged forged endorsements of the respective named payee. Bankers Trust asserted the same defenses as were asserted in the action instituted by MHT Co. and, similarly, issued a third-party complaint against Eleanor Simon, individually, and Eleanor Simon as Administratrix of the Estate of Jerome Simon by virtue of the Simons' warranties of prior endorsements.

(3) The Fund and its individual trustees instituted an action directly against Eleanor Simon, individually and as Administratrix of the Estate of Jerome M. Simon. That complaint alleges various causes of action against Mrs. Simon as Administratrix for fraud, monies had and received and for breach of Simon's employee contract. The complaint asserts additional causes of action against Mrs. Simon, individually, for wrongfully having and receiving monies which were directly traceable

to the Fund and were deposited to her accounts. On February 12, 1982, Eleanor Simon died testate and Irving Simon was named her executor. The Fund and the individual trustees petitioned for an order substituting Irving Simon as a party defendant in place of Eleanor Simon, individually, and as administratrix of the estate. The court granted the motion.

(4) The Fund and its individual trustees instituted an action against Barrister Shoe, Inc. seeking to recover $15,095.00 on various checks deposited in that account between August 29, 1972 and November 5, 1974.

(5) The Fund and its individual trustees brought suit in state court, alleging that its former accountants "had failed and neglected to detect and report the misappropriation by Jerome Simon, the administrator of the Fund, of some $765,000 of Fund assets." (A.2.) The accountants, the petitioners herein, denied liability and alleged in both their affirmative defense and in the third-party claims against the trustees, individually, that "the trustees themselves failed in their own fiduciary responsibilities to the Fund, which caused or contributed to the loss. By these allegations, they seek . . . to apportion liability for Simon's tortious conduct among the parties to this action, all of whom allegedly shared responsibility for monitoring the operation of the Fund." (A.6a).

The trustees moved to dismiss the third-party complaint on the basis that the state court lacked jurisdiction to adjudicate the petitioner's claims for contribution because those claims were preempted by section 514(a) of ERISA, 29 U.S.C. section 1144(a) and that the state court lacked jurisdiction under section 502(e) of ERISA, 29 U.S.C. section 1132(e).

The New York Supreme Court denied the trustees' motion to dismiss the third-party complaint holding that the statutory right of contribution and/or indemnification was of "significant interest" to New York State and was only "tangential in nature and are not pre-empted under ERISA". (A.15a). The New

York Court of Appeals reversed in a four to three split decision and held that the state courts lacked jurisdiction from entertaining claims "against the individual trustees of the plan for contribution or indemnity based on allegations that breach of their fiduciary duties by the trustees contributed to the losses sustained by the plan." (A.2a).

Interest of Bankers Trust Company

As we have shown, Bankers Trust is now or will be made a party to this proceeding by order of the state court which granted consolidation on January 23, 1985. The Fund and its trustees recognized the interest of Bankers Trust by making demand on Bankers Trust in 1980 and instituted a lawsuit against Bankers Trust seeking the recovery of in excess of $600,000.

Indeed, the interest of Bankers Trust in this very proceeding is made clear by the moving affidavit of Maltz in support of the motion to dismiss the third party action. Maltz states that "[b]ased on these duplicate vouchers, checks were issued and endorsements were forged by Simon, and were negotiated by him, in most cases at Bankers Trust Company." (R. 29)[2]

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[2]On the basis of this admission by Maltz, the fund is precluded from recovery against Bankers Trust by section 3-405 (1) (c) of the New York Uniform Commercial Code, the applicable law. The official comment to the Code makes it clear that this provision was intended to:

> "include the padded payroll cases, where the drawer's agent or employee prepares the check for signature or otherwise furnishes the signing officer with the name of the payee.
> The principle followed is that the loss should fall upon the employer as a risk of his business enterprise rather than upon the subsequent holder or drawee. The reasons are that the employer is normally in a better position to prevent such forgeries by reasonable care in the selection or supervision of his employees, or, if he is not, is at least in a better position to cover the loss by fidelity insurance; and that the cost of such insurance is properly an expense of his business rather than of the business of the holder or drawee.

(Footnote continued on following page)

In its answer, Bankers Trust makes it very clear that not only is it exculpated by the fictitious payee rule discussed, *supra*, fn. 2, but also the negligence in the administration of the Fund by the trustees and their agents, including the accountants and auditors who admittedly failed to detect Simon's scheme of issuing duplicate checks between December 1972 and 1980, immunizes Bankers Trust from liability under 4-406 of the Uni-

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(Footnote continued from previous page)

> The provision applies only to the agent or employee of the drawer, and only to the agent or employee who supplies him with the name of the payee. The following situations illustrate its application.
> a.) An employee of a corporation prepares a padded payroll for its treasurer, which includes the name of P. P does not exist, and the employee knows it, but the treasurer does not. The treasurer draws the corporation's check payable to P.
> b.) The same facts as (a), except that P exists and the employee knows it but intends him to have no interest in the check. In both cases an indorsement by any person in the name of P is effective and the loss falls on the corporation."

The record is clear that Bankers Trust has an effective defense against the Fund and MHT Co. under section 3-405(1)(c) of the Uniform Commercial Code. The payee, who Simon intended to receive the proceeds of these checks, received the proceeds. Thus, as recognized in the Commentary to the Code and long noted by the courts, the Code rule is no less applicable where the intended payee is a real and not a fictitious person. In *Hall* v. *Bank of Blasdell*, 306 N.Y. 336, 118 N.E. 2d 464 (1954), the New York Court of Appeals noted that a check drawn to a real person is still within the rule (306 N.Y. at 344):

> "The only operative factor is the intent of—as the case may be—the indorser of the drawer. See *Phillips* v. *Mercantile Nat. Bank, supra*, 140 N.Y. 556, 35 N.E. 982; *Coffill* v. *American Exch. Bank, supra*, 1 N.Y. 113; *Matter of Hammer's Estate, supra*, 237 App. Div. 497, 261 N.Y.S. 478, affirmed 261 N.Y. 677, 185 N.E. 789; cf. *Cohen* v. *Lincoln Sav. Bank*, 275 N.Y. 399, 10 N.E. 2d 457, 112 A.L.R. 1424; *Shipman* v. *Bank of State of N.Y.*, 126 N.Y. 318, 27 N.E. 371, 12 L.R.A. 791. If the drawer or indorser does not intend the named payee or indorsee to receive the check, that party is deemed a merely nominal or 'fictitious' endorsee or payee. And since the indorser or drawer could as easily have made the check payable to bearer, the law regards him as having done so."

form Commercial Code. Bankers Trust, nonetheless, exercised its statutory right to seek indemnity from the various other individuals who warranted all prior endorsements to Bankers Trust under CPLR section 1007. Bankers Trust proceeded to institute third-party and fourth-party actions in the previously consolidated cases, *supra*, pp. 5-7.

Reasons for Granting Certiorari

The decision of the New York Court of Appeals in holding that ERISA insulates the trustees of a welfare fund in their individual capacities who personally instituted five lawsuits in state court from being subjected to a third-party impleader action for indemnity and/or contribution is contrary to sound judicial practice which seeks the avoidance of multiplicity of actions and an economical resolution of inter-related lawsuits in one proceeding. ERISA does not preclude the application of the State Uniform Commercial Code to responsibility for the management of checking accounts.

In *Franchise Tax Board* v. *Construction Laborers Vacation Trusts,* U.S. , 103 S. Ct. 2841, 2854-55 (1983), this Court held that ERISA section 502(a) (the civil enforcement provision) "does not purport to reach every question relating to plans covered by ERISA." Further, this Court stated that section 514 (the pre-emption provision) of ERISA.

> ". . . makes clear that Congress did not intend to preempt entirely every state cause of action relating to such plans. With important, but express limitations, it states that 'nothing in this subchapter shall be construed to relieve any person from any law of any State which regulates insurance, banking or securities' ".

Although petitioner has characterized the complaint as a negligence action and is seeking contribution in tort, the facts applicable to the five consolidated lawsuits are really concerned with the duty of care owed in the management of the Fund's

checking account at MHT Co. where the plan's Administrator prepared "duplicate vouchers with respect to claims submitted by Fund beneficiaries. Based on these duplicate vouchers, checks were issued and endorsements were forged by Simon, and were negotiated by him, in most cases at Bankers Trust Company", *supra,* p. 4.

In the complaint against the accountants, petitioners herein, the Fund alleged, *inter alia,* that its former administrator ". . . dishonestly and fraudulently misappropriated and converted checks and the proceeds thereof." (R.55)

The accountants are charged with both breach of their agreement and negligence in failing, *inter alia*:

(a) To examine cancelled checks and confirm that payments by the Fund were proper, and

(b) To test the Fund's internal accounting systems. (R.30).

In their third-party complaint, the accountants denied liability and assert that the trustees permitted "the Administrator Mr. Jerome M. Simon to act without supervision, control and/or review." (R. 56).

These issues are identical to the issues alleged by Bankers Trust in its answer to the complaint and recognized under 3-406 of the New York Uniform Commercial Code as an affirmative defense. As noted in the comment to the Uniform Commercial Code, this provision increases the duty of care owed to the drawee by one who sets an instrument in motion.

These actions instituted in the State Courts by the Fund and its individual trustees are plainly within the scope of lawsuits which Congress intended should remain subject to state court jurisdiction unless other aspects of Federal jurisdiction prevail. The liability and responsibility for the management of checking accounts was intended by Congress to remain subject to state law.

As noted by Judge Kaye in her dissenting opinion, the exclusive jurisdiction provision of ERISA "would not prevent the state court from considering [the derelictions of the trustees] when they are part and parcel of defenses to a cause of action premised on state law." (A.7a-8a). A different result should not take place when the trustees are being sued as third-party defendants in the very same action which they themselves initiated. Such a result would permit a participant in a fraudulent transaction to insulate themselves from liability for their own conduct and retain the fruits of the wrongdoing from the claims of the injured party.

The courts have recognized that third-party practice is necessary and helpful in cases involving allegations of forgery with respect to checks and drafts. The principal objective of impleader and third-party practice is recognized to be "as a tool for economical resolution of inter-related lawsuits." *George Cohen Agency, Inc.* v. *Donald S. Perlman Agency, Inc.*, 51 N.Y. 2d 358, 365, 434 N.Y.S. 2d 189, 193 (1980).

This petition presents an important issue in resolving the procedure to be followed by the courts in litigating a claim arising with respect to the management of a checking account by an Employee welfare fund which is subject to ERISA. We believe that the decision of the New York Court of Appeals in declining to exercise jurisdiction over the third-party complaint is incorrect and this Court should grant the petition for a writ of certiorari and reverse the decision of the New York Court of Appeals.

Respectfully Submitted,

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March 21, 1985

APPENDIX

SUPREME COURT OF THE STATE OF NEW YORK,
SPECIAL TERM PART I, NEW YORK COUNTY

at the Courthouse therefore, 60 Centre Street,
New York, New York 10007

Present: Hon. WILLIAM P. MCCOOE, Justice.

RETAIL SHOE HEALTH COMM.

—against—

CHARLES G. REMINICK, *et al.*

The following papers numbered 1 to 5 read on this motion, submitted No. 176 on Calendar of 1/22/85.

Notice of Motion—Order to Show Cause—and Affidavits Annexed	1-2
Answering Affidavit	4
Replying Affidavit	5
Affidavit Service	3

Upon the foregoing papers this motion for an Order of Consolidation is granted (CPLR 602A). The liability, if any, of all parties to the plaintiff arising out of the same fact pattern should be determined on one action. If delay causes prejudice, a party can move for a severance.

Settle Order.

Dated 23 January, 1985

W. P. M.

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